REFORM OF SUPERFUND ACT OF 1995

HEARINGS

BEFORE THE

SUBCOMMITTEE ON COMMERCE, TRADE, AND HAZARDOUS MATERIALS

OF THE

COMMITTEE ON COMMERCE HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTH CONGRESS

FIRST SESSION

ON

H.R. 2500

OCTOBER 18 AND 26, 1995

Serial No. 104–59

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REFORM OF SUPERFUND ACT OF 1995

WEDNESDAY, OCTOBER 18, 1995

HOUSE OF REPRESENTATIVES,
COMMITTEE ON COMMERCE,
SUBCOMMITTEE ON COMMERCE, TRADE,
AND HAZARDOUS MATERIALS,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:07 a.m., in room 2123, Rayburn House Office Building, Hon. Michael G. Oxley (chairman) presiding.

Members present: Representatives Oxley, Fields, Crapo, Bilbray, Norwood, Furse, Markey, Manton, Brown, Lambert Lincoln, and Stupak.

Also present: Representatives Wyden and Pallone.

Staff present: Nandan Kenkeremath, majority counsel, James Barnette, majority counsel, Frederick Eames, majority counsel, Hugh N. Halpern, majority professional staff member, Richard A. Frandsen, minority counsel, David Tittsworth, minority counsel, and Alison Berkes, minority counsel.

Mr. OXLEY. The hearing of the subcommittee will come to order. We welcome our distinguished colleagues today to testify before the subcommittee on the subject of the Superfund Reform Act to be introduced later today.

Let me first begin with our colleagues from Indiana, the gentleman from Indiana, Mr. Roemer, who has a heavy heart this morning and I'm sure will explain to the committee why that is the case before he launches into his explanation of his support for the Superfund Bill. The gentleman from Indiana.

STATEMENTS OF HON. TIM ROEMER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF INDIANA; HON. PETER J. VISCLOSKY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF INDIANA; HON. RALPH REGULA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO; AND HON. RODNEY P. FRELINGHUYSEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY

Mr. ROEMER. Isn't it enough, Mr. Chairman, that I'm here to endorse your bill? Do I have to talk about our humiliating defeat last night on the basketball court, as well, too, and that you were the captain of the victorious team? Is that enough, Mr. Chairman?

Mr. OXLEY. That's quite enough. We appreciate that.

Mr. ROEMER. Mr. Chairman, Mr. Wyden, members of the committee, it is an honor for me to testify here this morning before

your committee on the need to revise and reform and modify the Superfund law.

There exists today a web of regulation that has strangled Superfund's good intentions, leaving the most severely polluted sites in our Nation uncleaned. Our Nation is still stained with pollution and our courts are increasingly clogged with lawsuits. Rather than achieving public health, we are currently stressing private wealth in the courts.

I'm here today to urge you to pursue Superfund reform before this session of Congress ends. It is imperative, Mr. Chairman, that we are in Congress today addressing the dramatic inequities of this program.

Yes, polluters should pay to clean up the pollution they create, and this bill does not let the polluters off the hook. But Superfund has spawned an almost unlimited succession of finger-pointing and blame circles that are universally ending people up in court. Instead of cleaning up, we are mired in the courts. Instead of reclaiming brownfields, we are polluting pristine farmlands. Instead of protecting our natural resources, we are padding the pockets of lawyers and consultants.

As I have previously corresponded with you, Mr. Chairman, I want to acquaint the members of this subcommittee with 2 Superfund sites in my district that dramatize the need for reform today and not wait until next month or next year.

The first is called the Wayne Reclamation Site in Whitley County, Indiana, which is not actually in my district. The site was identified and cleaned up. Afterward, additional records were discovered that added an additional 800 potential responsible parties, known as PRP's, to the list of contributors to this site.

These parties, many of whom are my constituents, are now being sued by the major polluters to recover additional costs. These PRP's did not have the benefit of the regular Superfund process and may face the real possibility of losing their businesses, their retirement savings, or both. Due process was lost in the shuffle to litigate.

The second situation is equally troubling, but for different reasons. The Waste, Incorporated Superfund site in Michigan City, Indiana is very disturbing and very unfair. Existing records indicate the volume of waste that a small business contributed to this site but not whether the site and the waste was toxic. As a result, all PRP's are being equally treated, and this should not be the intention or the outcome of Superfund laws.

For example, a lumberyard, the Chamber of Commerce offices and factories are all being placed in the same category. This certainly defies logic and seems to need immediate reform.

In both of the above situations, businesses paid a premium fee for a private company to manage their waste. The management company violated the law, not the small business owners. Yet the small businesses apparently are being forced to pay for the sins they did not commit. They made a good faith contract with the Superfund law as applied, and it violates it. Congress must fix these glaring injustices.

Your bill, Mr. Chairman, seems to be the sensible way to begin reforming Superfund. Your approach involves the States and the Governors, brings badly needed relief to the little guys, and will

help to revitalize brownfield sites, which, as members representing the Midwest all too well know, are being abused.

The restoration of brownfields is not only critical to our economic engine, but it is badly needed in the environmental area, as well. Every brownfield site that is renovated and restored means another pristine farm site that is preserved from development. This element of your legislation is important and necessary, and your foresight, Mr. Chairman, deserves commendation.

Mr. Chairman, you are right in what you've been saying and I would like to quote you here. "Let's get Superfund done this year. Let's call an end to the scares and the squabbles and get down to the one thing that the people of this country are asking for: clean up."

As an original cosponsor of your legislation, I want to thank you again for the opportunity to be here today. I want to say that I'm supporting it for 3 reasons: (1) it gives the States more involvement, the Governors more involvement in what sites will be cleaned up and what sites will be added; (2) the brownfield situation is critical to members in the Midwest; and (3) this bill is responsibly funded.

Finally, Mr. Chairman, I just want to say that I will encourage the Democratic administration to admit there is a problem and that there is a bipartisan solution, and I would encourage the Republican leadership, Mr. Chairman, to schedule time this year to bring this bill to the floor, to start the debate on Superfund reform. Let us all be resolved and committed to fixing this vexing problem. Thank you, Mr. Chairman.

[The prepared statement of Hon. Tim Roemer follows:]

PREPARED STATEMENT OF HON. TIM ROEMER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF INDIANA

Mr. Chairman, I want to thank you for your great kindness in inviting me to testify before this panel. I also want to express my great respect for the amount of effort you have put into crafting legislation to reform the Superfund law and the web of regulation that has strangled its good intentions, leaving the most severely polluted sites in our nation uncleaned and our courts clogged with lawsuits.

I am here today to urge you to pursue Superfund reform before this session of Congress ends. It is imperative that we in Congress address the dramatic inequities of this program. Yes polluters should pay to clean up the messes they make. But Superfund has spawned an almost unlimited succession of finger pointing and blame circles that universally end up in court. Instead of cleaning up, we are mired in the courts. This must stop.

As I have previously corresponded with you, Mr. Chairman, I want to acquaint the members of this subcommittee with two Superfund sites in my district that dramatize the need for reform as soon as possible. The first is the Wayne reclamation site in Whitley County, Indiana, which is not in my district. The site was identified and cleaned up. Afterward, "additional records" were discovered that added an additional 800 Potential Responsible Parties (PRP's) to the list of contributors to this site. These parties, many of whom are my constituents, are now being sued by the major polluters to recover additional costs. These PRP's did not have the benefit of the regular Superfund process, and many face the real possibility of losing their businesses, retirement savings, or both.

The second situation is even more unfair. The Waste, Inc. Superfund site in Michigan City, Indiana, is very troubling. Existing records indicate the volume of waste that a small business contributed to this site, but not whether the waste was toxic or not. As a result, all PRP's are being treated equally, and this is not fair. For example, a lumber yard, the Chamber of Commerce offices, and factories are all being placed in the same category. This certainly defies logic, and seems to need immediate reform.

In both of the above situations, businesses paid a premium fee for a private company to manage their waste. The management company violated the law, not the small business owners. Yet the small businesses apparently are being forced to pay for sins they did not commit. They made a good faith contract and the Superfund law as applied violates it. Congress must fix these glaring injustices.

Your bill, Mr. Chairman, seems to be the sensible way to begin reforming Superfund. Your approach involves the states, brings badly needed relief to the "little guys," and will help to revitalize "brownfield" sites, which, as Members representing the mid-West we know all too much about. The restoration of brownfields is not only critical to our economic engine, but is a badly needed environmental concern as well. Every brownfield site that is renovated and restored means another pristine site that is preserved from development. This element of your legislation is important and necessary, and your foresight in including it deserves commendation.

Mr. Chairman, you are right in what you have been saying, and I would like to quote you here. "Let's get Superfund done this year. Let's call an end to the scares and the squabbles, and get down to the one thing that people are asking for: cleanup." As an original cosponsor of your legislation, I want to thank you again for the opportunity to be here today, and express how pleased I am to be part of the cleanup of Superfund.

Mr. OXLEY. Thank you for your excellent statement. Our next witness is our good friend Peter Visclosky from southern Indiana, and welcome to the panel and you may begin.

STATEMENT OF HON. PETER VISCLOSKY

Mr. VISCLOSKY. Mr. Chairman, thank you very much. Your earlier remarks directed to Mr. Roemer and the fact that we have been introduced first would also lead me to congratulate the chairman on Ohio State's football victory 2 weeks ago over the University of Notre Dame, Mr. Roemer and my alma mater. And at that point I will stop, Mr. Chairman.

I would also ask the committee's indulgence to have my entire statement entered into the record.

Mr. OXLEY. Without objection, all the statements will be made a part of the record.

Mr. VISCLOSKY. Mr. Chairman, I would like to thank you, Mr. Wyden, and the other members of the subcommittee for this opportunity to focus on an important issue of brownfield redevelopment in the context of Superfund reform. I'm here today with my colleague, Mr. Regula, to reiterate bipartisan support for finding a practical solution to a host of complex issues presented by brownfields.

Expediting the redevelopment of brownfields is vitally important to the area I represent in Indiana, as well as to communities across the Nation.

I commend you, Mr. Chairman, for your leadership in including a title in your draft Superfund reform legislation which specifically pertains to brownfields and the role of State voluntary cleanup programs in redeveloping contaminated industrial sites. I believe one of the most promising ways to promote the cleanup of our Nation's hundreds of thousands of low and medium priority sites is through State voluntary cleanup programs.

While the States are proceeding without action from the Federal Government, State and local cooperation will achieve less than optimal results. It is up to Washington to break down the barriers to brownfield redevelopment. As Superfund moves through the 104th Congress, we must ensure that the field brownfield provisions create jobs, clean the environment, and return economic de-

velopment to our urban areas. True brownfields reform must also ensure that these provisions do not start a race to the bottom, where cleanup standards are sacrificed.

Mr. Chairman, I want to talk about three issues. The first is certainty. I am pleased that title III of your bill provides for a process whereby States with approved remedial action programs would be able to clean up contaminated sites without incurring new Federal administration or judicial enforcement actions. This provision is very similar to the process established in the legislation introduced by Mr. Regula and myself.

Our bill, the Brownfield Cleanup and Redevelopment Act, would authorize States with voluntary cleanup programs certified by the Administrator of EPA to make final decisions on the cleanup of sites with low or medium priority contamination.

By giving States the power to create a distinct beginning and end to the voluntary cleanup process, we remove a crucial roadblock to economic redevelopment and improved environmental conditions.

Time and again, the compelling need to remove the uncertainty from the process of redeveloping brownfield sites has been demonstrated.

Second, the issue of funding. I would urge you to consider incorporating a funding component for brownfields redevelopments into the final version of your bill. Specifically, I would call your attention to the Brownfield Cleanup and Redevelopment Revolving Loan Pilot Project in legislation Mr. Regula and I introduced, H.R. 1621. This legislation would authorize the EPA Administrator to establish a 3-year $20 million pilot project providing revolving loans to States. States would have to also provide a 20 percent match and begin repaying within 5 years.

In a related matter, I am encouraged by the embrace of the interest-free loans in the Senate Superfund Reform Bill, S. 1285. While I realize that we are all under tight budgetary constraints, limited capital investment in depressed sites can be leveraged and would help to rebuild communities that have been written off as lost causes.

And finally, in conclusion, State and local governments have become real leaders in the issue of brownfield redevelopment. It is inspiring to see the innovative ways in which State and local leaders, along with support from the EPA, have begun to solve this problem. Forming partnerships between the different levels of government has proven to be a successful approach to furthering economic development in my congressional district, and I think this cooperation would be a model for the Nation.

I don't mean to be a grim reaper, and I do hope that Superfund legislation is enacted between now and the end of the first session of this Congress. However, I am concerned, if Superfund legislation becomes bogged down, that brownfields be severed and that we not lose the consensus that has been built on this issue and that we proceed as a stand-alone measure.

Mr. Chairman and members of the committee, again I thank you for your attention and thank you for your special attention to the issue of brownfields.

[The prepared statement of Hon. Peter J. Visclosky follows:]

PREPARED STATEMENT OF HON. PETER J. VISCLOSKY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF INDIANA

Mr. Chairman, I would like to thank you and the other members of the Subcommittee for this opportunity to focus on the important issue of brownfield redevelopment in the context of Superfund reform. While other aspects of Superfund reform have proven to be controversial, I am here today with my distinguished colleague, Ralph Regula, to reiterate the bipartisan support for finding a practical solution to a host of complex issues presented by brownfields. Expediting the redevelopment of brownfields is vitally important to the area I represent in Northwest Indiana, as well as communities across the nation.

I commend you, Mr. Chairman, for your leadership in including a title of your draft Superfund reform legislation, which specifically pertains to brownfields and the roll of state voluntary cleanup programs in redeveloping contaminated industrial sites. I believe one of the most promising ways to promote the cleanup of our nation's hundreds of thousands of low- to medium-priority sites is through state voluntary cleanup programs. To date, 21 states, including Indiana, have implemented, or are in the process of implementing, voluntary cleanup programs.

Without action from the Federal government, state and local cooperation will achieve less than optimal results. It is up to Washington to break down the barriers to brownfield redevelopment. As Superfund moves through the 104th Congress, we must ensure that the final brownfield provisions create jobs, clean the environment, and return economic development to our urban areas. True brownfields reform must also ensure these provisions do not start a race to the bottom, where cleanup standards are sacrificed. We must ensure that brownfields do not become a backdoor to let polluters off the hook and that provisions remain for real public participation, cleanup and redevelopment. A final product that does not meet this standard, falls short of a readily achievable goal.

Certainty

I am pleased that Title III of your bill provides for a process whereby states with approved remedial action programs would be able to cleanup contaminated sites without incurring new Federal administrative or judicial enforcement actions.

This provision is remarkably similar to the process established by legislation Mr. Regula and I introduce in May, H.R. 1621. Our bill, the Brownfield Cleanup and Redevelopment Act, would authorize states with voluntary cleanup programs certified by the Administrator of the Environmental Protection Agency to make final decisions on the cleanup of sites with low- or medium-priority contamination. By giving states the power to create a distinct beginning and end to the voluntary cleanup process, we remove a crucial roadblock to economic redevelopment and improved environmental conditions.

Time and time again, the compelling need to remove the uncertainty from the process of redeveloping brownfield sites has been demonstrated. For example, plans to build a $3 million lumber treatment plant, which would have provided 75 jobs in Hammond, Indiana, were abandoned after the discovery of low levels of contamination at the proposed site. The daunting prospect of entering into a project with uncertain consequences resulted in a loss for the City of Hammond of not only one prospective developer, but the potential of any future development on this 20-acre site. The good news is that this site, at the Artim Industrial Park in Hammond, is currently involved in the Indiana Voluntary Remediation program.

Funding

Since you have circulated a "discussion draft" of your Superfund reform legislation, I would urge you to consider incorporating a funding component for brownfields redevelopment into the final version of your bill. Specifically, I would call your attention to the Brownfield Cleanup and Redevelopment Revolving Loan Fund Pilot Project Act, which Ralph Regula and I also introduced in May as a companion bill to H.R. 1621. This legislation, H.R. 1620, would authorize the EPA Administrator to establish a three-year, $20 million pilot project providing revolving loans to states. States would provide a 20% match and begin repaying within five years. In a related matter, I am encouraged by the embrace of interest-free loans in the Senate's Superfund reform bill, S. 1285. While I realize we are all under tight budgetary constraints, limited capital investment in depressed sites would help to rebuild communities that have been written-off as lost causes.

Conclusion

State and local governments have become real leaders on the issue of brownfield development. On June 2, I hosted a Northeast-Midwest forum in East Chicago, Indiana, which brought together Federal, state, and local leaders, community activists,

business interests, and lending institutions to talk about ways in which we could further the redevelopment of brownfield sites. At the local level, a tri-city task force is actively developing strategies to facilitate brownfield redevelopment. It was truly inspiring to see the innovative ways in which state and local leaders, along with the support of EPA Region V, have begun to solve this problem. Forming partnerships between the different levels of government has proven to be a successful approach to furthering economic development in my congressional district. This cooperation should be the model for a national solution.

Finally, not to be the grim reaper, but if Superfund reauthorization gets bogged down in a battle over repeal of retroactive liability, I would like to express my strong support for moving brownfields legislation as a stand alone bill. It would be tragic to waste the consensus we have reached on this issue, as well as an opportunity to get something done. By failing to confront this issue, we would continue to subject our constituents to the jeopardies of health hazards and stagnant economic development brought about by unaddressed environmental contamination.

I urge you, Mr. Chairman, and other Subcommittee members, to keep up your efforts to breathe life back into forgotten industrial communities. Thank you.

Mr. OXLEY. Thank you for your statement and we now turn to my colleague from Ohio. It's not often that our committee hears from a cardinal and the chairman of the Interior Appropriations Committee. The gentleman from Navarre, Ohio, Mr. Regula.

STATEMENT OF HON. RALPH REGULA

Mr. REGULA. Thank you, Mr. Chairman. I thought when you were first talking with Mr. Roemer, I was trying to figure out what connection he had with the Seattle Mariners. I didn't realize what a momentous event took place last night that overshadowed the success of the Cleveland Indians. We've got to keep our priorities straight.

I'm not going to be repetitious. I think our 2 previous speakers covered it very well.

This is important and, as Mr. Visclosky said, if, for any reason, Superfund gets bogged down, we should move ahead with H.R. 1621 or a version thereof to deal with brownfields because the cities have a very difficult problem in keeping industry and attracting industry.

And as we talk about welfare reform, a very important component of welfare reform will be availability of jobs of all types, so that individuals who want to take advantage of the programs that we will hopefully put in place to become self-sufficient will have a way of doing that.

And a very important key to that is the retention and redevelopment of urban areas and the real impediment has been the existing EPA regulations on brownfields. And I've seen it happen in my district over and over again and in the Cleveland area, Akron area, the adjacent areas, where a company will go out and build a new plant on a greenfield outside the city and, of course, I understand why they do it, but that's why the brownfields part of this is so vitally important.

It's not only the jobs that would become available but it's the economic base of the cities. And this means money for schools. It means money for all the urban problems that confront the leadership in our cities. So I think there are some very compelling reasons to address the brownfields and give the State the ability to meet that need.

I think you've done a great job on it. As a matter of fact, I believe that the provisions that are in ROSA are actually somewhat more

flexible than we originally anticipated in H.R. 1621, and I congratulate you, Mr. Chairman and members of the committee, for doing a good job. And, as Mr. Roemer says, I hope we can successfully get this bill passed. It's certainly one of the important pieces of legislation for this legislative year.

As Mr. Visclosky said, I think the financing mechanism needs a little upgrading to provide the States with some incentives to, in turn, help those who want to revitalize a brownfield. So I would hope that you take a look at the financing ideas that are in the Senate bill, as well as what we proposed in H.R. 1621, to add some additional improvement to what is already good language in the bill that you have before you.

I hope that we do get this moved this year. I think it's vitally important to the growing economic success of our urban areas, and certainly one of the critical areas that we've all recognized. And I thank you, Mr. Chairman and members of the committee, for the opportunity to make these few suggestions this morning.

[The prepared statement of Hon. Ralph Regula follows:]

PREPARED STATEMENT OF HON. RALPH REGULA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

Mr. Chairman: I appreciate the opportunity to come before you and your committee to testify in support of including brownfields and voluntary response provisions in the Reform of Superfund Act of 1995 (ROSA).

Mr. Chairman, I would like to thank you, your committee and your staff for your hard work in examining and addressing the impediments to redeveloping brownfields in your draft Superfund legislation. As I have stated in previous testimony before your committee, attention to the issue of brownfields has come a long way from primarily being recognized as a local or regional problem to one of national proportions.

As you know, local and state governments have been trying to recycle these sites for a long time. In fact, many states, including Ohio, have created voluntary cleanup programs to attract private investors and developers to reuse these sites.

Moreover, our Federal agencies, specifically EPA and HUD, now recognize that addressing environmental contamination is imperative to recharging our urban wastelands. Certainly, EPA has made positive steps not only in giving states with strong environmental response programs more authority with which to remediate sites, but in creating a Brownfields Action Agency earlier this year to advance the cleanup and reuse of contaminated industrial sites.

Despite these state and Federal activities, I remain convinced that such action is not enough. Unfortunately, the unintended consequences of the environmental laws which Congress adopted have created a string of inhibitors to the redevelopment of brownfields. Such barriers include fear of liability for environmental contamination on behalf of lenders and prospective purchasers; uncertainty of environmental contamination and costs; uncertainty of future intervention by the Federal government with states' brownfields cleanup plans; and lack of financing.

I believe that Congress is in the position to break down those barriers. For the past two Congresses, my good friend from Indiana, Pete Visclosky and I have introduced legislation to address such barriers. Entitled "The Brownfield Cleanup and Redevelopment Act" and "The Brownfield Cleanup and Redevelopment Revolving Loan Fund Pilot Project Act," HR 1620 and 1621 would establish a process whereby states can be authorized by the EPA to make final decisions on cleanup and future liabilities for low and medium sites (non-Superfund sites); and provide loans to clean up some of these sites to attract private investment and create local jobs.

As you know, HR 1621 establishes a process whereby states can be authorized by EPA to make final decisions on cleanup and future liabilities for low and medium level contamination. The process would require EPA to develop minimum criteria to certify state voluntary cleanup programs such as: adequate public participation; technical assistance throughout each cleanup; oversight capacity and enforcement authority; and certification to owner or prospective owner that a site is clean once the process is satisfactorily completed. Those states meeting specific program criteria would then be authorized to make the final decisions on cleanup and future

liabilty for the property. Thus, because the states would be making such final decisions, the fear of future Federal involvement can be eliminated.

Furthermore, HR 1620 would provide capital to cover up-front cleanup costs. Through our state voluntary cleanup program certification bill, Federal money would be loaned to states, which in turn could use these monies to capitalize revolving loan funds to support local cleanup and redevelopment projects. Assistance would be targetod to public and private industrial owners with firm plans to clean and reuse those sites for "clean" manufacturing purposes. States would then be required to repay the loan after a designated time.

Mr. Chairman, I am pleased your committee has given the brownfields dilemma serious attention, as evident with ROSA's Title III, Brownfields and Voluntary Cleanups and Title IX, Remediation Waste Management. Your thorough and innovative approach not only creates incentives to states for developing voluntary response and remediation waste programs, but incentives to lenders and developers to be proactive participants, as opposed to reactive participants, in the redevelopment of brownfields.

First, your legislation encourages and recognizes states in their efforts to create individual voluntary response program by requiring EPA to offer technical and other assistance to states which have established voluntary response programs. Your bill grants states maximum flexibility in creating their programs, offering prescriptive, rather than mandatory criteria for state programs.

Second, Title IX encourages states to develop (if they haven't already) waste remediation programs through RCRA statute. With Federal certification of this RCRA program, regulatory and permitting procedures would be significantly streamlined to speed up the pace of remediating brownfields. Provisions from Title IX not only encourage a streamlined approach to regulating hazardous waste, but furthers certainty in the remedy selection process through risk application and cost-effectiveness.

Third, I congratulate your bill's provisions which address the fear of liability of environmental contamination on behalf of the lender and the developer through reducing liability of the lender, prospective purchaser and innocent landowner. I firmly believe that this aspect of your bill will dramatically mobilize private sector participation in redeveloping our brownfields.

Fourth, I support your bill's provisions in Title III and IX which I believe address the most important impediment to brownfields redevelopment: uncertainty of future Federal involvement in clean-up plans. Because your bill would preclude the threat of Federal enforcement action upon any remedial plan proposed by a federally certified state voluntary or RCRA program, the state's remediation process is validatod, therefore granting finality and assurance to the various parties involved in a remedial plan. Indeed, this was one of HR 1620's main goals—to prevent the Federal government from overfiling state decisions regarding cleanup.

There is no doubt in my mind that the effective combination of Title III and IX will have far-reaching gains in speeding the pace of response activities of brownfields, thus benefiting the public health, welfare, and the environment by returning contaminated sites to economically productive or other beneficial uses.

One barrier which I believe remains unaddressed by ROSA is the difficulty of financing for brownfield redevelopment. As the Senate's version of the Superfund bill includes financial assistance to states, I would like to reiterate my support for ROSA including revenue-neutral financial assistance to states, as proposed in our brownfields revolving loan fund bill, HR 1620. Mr. Chairman, I hope you will consider including such a mechanism.

Mr. Chairman, you have been a leader in the pursuit of reforming these sites to ones which are not only productive, but clean. ROSA rectifies the unintended consequences of the environmental laws which we created. Provisions including state voluntary response and waste remediation programs, lender, prospective purchaser, and innocent landowner liability, and limited Federal enforcement actions are the gateway to forming innovative and committed partnerships of all levels—local, state and Federal governments, lending institutions, developers and communities. Through these partnerships the barriers to brownfield redevelopment can be overcome to provide jobs, a tax base for local governments, and an improved quality of life for city residents. I appreciate your openness to our dialogue and look forward to working further with you and your staff on this very important problem.

Thank you.

Mr. OXLEY. Well, thank you and thank you for your leadership, both of you gentlemen, for your brownfields initiative. And many

of the ideas incorporated in our bill came from both of you, so we appreciate your help and leadership in this.

Our final member witness is Rodney Frelinghuysen from New Jersey, who was appropriator and happens to be on the VA-HUD Appropriations Subcommittee and was helpful in bumping our appropriations for Superfund from the original proposal up to something a little more acceptable. We'd like to have had a little more money but we understand the budget constraints, as well.

And I understand that Rodney also has the most Superfund sites in his congressional district of any Member of Congress, so it is not surprising that he would be with us this morning, and welcome to the subcommittee.

STATEMENT OF HON. RODNEY FRELINGHUYSEN

Mr. FRELINGHUYSEN. Thank you, Mr. Chairman and, like my colleagues, I want to salute your leadership on Superfund reform. I think you've really done a tremendous job, a lot of homework, and you and your committee are to be commended for the tremendous amount of work that's been done.

Yes, Mr. Chairman, I'm in the position of having a congressional district with 13 Superfunds on the National Priorities List, more than any other district in the Nation. And, as Mr. Pallone knows on the dias, New Jersey has 114 sites, more than any other State in the Nation, so we have a real commitment to getting reauthorization and proper funding.

I have toured, on an annual basis, for the last 5 or 6 years, all of these Superfund sites and I've worked very closely with the Environmental Protection Agency and State agencies and local officials and affected citizens. I'd like to share some of my observations from those visits with you.

There is general agreement in my district and probably here in this room that this program needs to be reformed, to spend more money directly on cleaning up sites, less on litigation, promoting community involvement, and encouraging flexibility and cooperation on the part of the EPA in cleaning up sites.

I found, Mr. Chairman, that cleanups in which our State's Environmental Protection Agency has taken the lead have operated more smoothly than those run by the EPA. Likewise, sites in which parties cleaning up have been granted a degree of flexibility by these agencies are much further along in the process than those which have not been treated with flexibility.

Unfortunately, though, I think that we all realize that in most people's eyes, and I'm referring to the people that have had contact with this program and the people that live on or near these sites, the way Superfund is currently operating is simply unacceptable.

Like Mr. Roemer, I want to share with you briefly the story of two very different sites in my district and their experience with Superfund. The first, in Long Hill township, an asbestos dump, is comprised of 2 residential farms and part of the Great Swamp National Wildlife Refuge. It contains large amounts of asbestos that was dumped on the property.

On one of these two residential sites, the EPA and the homeowners were involved in a lengthy and disputed cleanup, a highly publicized cleanup, in which the family with three children were

relocated for months at a time. The EPA proposed a remedy which would have entailed capping instead of removing asbestos from the property.

While the family and the community were not pleased with this remedy, the EPA went ahead with the remedy and came close to completing the lengthy cleanup at the end of last year. The EPA contractors, though, instead of bringing in clean fill to top the asbestos, actually brought in contaminated soil from another site to top the asbestos, adding more time to the cleanup and more to the months of agony for this particular family. Unbelievable.

The second site is a bit different. This is in Rockaway Borough, New Jersey. There they have a municipal well serving this particular town. Contamination in the municipal well posed an immediate health danger. This community decided to go ahead with the cleanup, pay for the cleanup and receive reimbursement from the EPA.

The remedy that they used was eventually approved by the EPA but was not, at the time the town decided to act. Because of their actions to clean the water, the borough was penalized by the EPA and was not able to receive reimbursement from the Federal Government because a remedy had not been given prior formal approval. This is very ironic, since the stated purpose of the Superfund is to protect the public from immediate health threats.

Mr. Chairman, arguing for funding for the Superfund program in the VA-HUD Appropriations Subcommittee, which has jurisdiction over Superfund, as you know, is not easy. As you're aware, the subcommittee planned to provide an appropriation of approximately $500 million. You wrote to the chairman in support of a $1.5 billion amount and, with your help and support, we were able to raise the appropriation to a little over $1 billion.

Additionally, in this VA-HUD Appropriations Bill, there's a time bomb set underneath the Superfund program. If this program is not reauthorized by December 31, 1995, the program comes to a stop. And while this committee is working very hard to bring an acceptable reauthorization to the floor, I am concerned that in all likelihood we may not have a reauthorization on the floor and passed by both houses by the end of the year.

For that reason, today I'm writing Chairman Jerry Lewis of the VA Appropriations Subcommittee and have asked that this drop-dead date be removed. That's December 31. I will further seek removal of this date during the House-Senate conference.

In addition, Mr. Chairman, I am concerned that if we do not change the funding mechanism for Superfund, we again will have a difficult time finding adequate funding for this program. As you know, no reform effort will succeed without sufficient resources. Under current law, the Superfund program is financed with a combination of appropriations from both the Superfund trust fund and the general fund accounts, which are subject to an annual cap. This cap means that Congress cannot increase cleanup activities unless we reduce spending on other important programs.

Because of these spending caps, extending taxes will not make additional resources available to support Superfund but will instead be credited towards deficit reduction. The Superfund Trust Fund already has a surplus of over $3 billion, and the surplus is growing.

While we may not agree on every detail of a reformed Superfund program, it is my belief that it doesn't make sense to reimpose the Superfund taxes as a means of increasing revenues to mask the size of the Federal deficit. We need to make sure that revenues resulting from these taxes are made available to clean up the Superfund sites. And, as a member of the VA-HUD Appropriations Committee, I can tell you that unless we have dedicated sources for cleanup, resources will be extremely difficult to find.

Mr. Chairman, I'm aware of the competing forces involved with the reauthorization of this bill. The simple bottom line in New Jersey is that this program needs to be changed to work in the best interest of cleaning up these sites and other around the Nation, and I certainly look forward to working with you in that regard. Thank you.

Mr. OXLEY. Thank you. And to all our panel members, we certainly appreciate your input on this. As we indicated, this hearing today and then one next week, we then plan to proceed expeditiously on this legislation because time is awasting and we've had, I think, 8 previous hearings already on oversight. We appreciate all of you bringing this to our attention and we thank you very much.

The subcommittee will proceed with opening statements, beginning with the Chair. Today is the first of 2 legislative hearings on the Reform of Superfund Act of 1995, or ROSA. The Superfund long-term remediation program has been an expensive headache, too costly, too slow, grossly inefficient, unscientific, and filled with lawyers.

ROSA is the cumulative product of nearly 3 years of work by this committee. Much of the work from the last Congress is in this legislation, risk assessment reform, greater roles for community involvement, a clearer role for the Agency for Toxic Substances and Disease Registry, consideration of the reasonableness of costs, elimination of the preference for permanence and treatment, delegation of sites to the States, and targeted liability reform for lenders and bona fide prospective purchasers.

H.R. 228, as introduced by Mr. Dingell, takes a number of steps in the right direction. Many of these steps, however, are swallowed by counterproductive language. For example, in remedy selection, H.R. 228 places limits on the use of site-specific information through national formulae. Remedy selection under H.R. 228 splits sites into 5 different sets of legal standards, with at least 16 exclusions, the sum total of which seems to take us back to the status quo.

ROSA fulfills the straightforward concepts of realistic risk assessment, reasonably foreseeable uses of land and water, and flexible and balanced decision criteria in the context of site-specific risk management.

We can no longer afford to spend billions of dollars on treatment for treatment sake or on excessively hypothetical and exaggerated risks. Kip Viscusi testified earlier that the median cost-effectiveness of Superfund remedies was over $300 million per hypothetical cancer incidence avoided. The legislative record reflects that EPA risk estimates are great overstatements and may actually be as low zero. A GAO study released this summer found that only 32 per-

cent of sites posed risks to human health under current land uses. We cannot continue to throw good money after bad.

Moreover, last year's bill does not address one of the major statutory barriers to State and voluntary cleanup today, the provisions of the Resource Conservation and Recovery Act. As Catherine Sharpe, representing the Association of State and Territorial Solid Waste Managers, testified: "When RCRA is applied to contaminated sites and site remediation issues, it is a poor fit and not just an inconvenience to people; it really does cause unnecessary delays in the progress at the sites; it does result in increased cleanup costs and; in general, renders our efforts less effective and less efficient at trying to get these projects through the pipeline."

The basic components of ROSA will remove statutory barriers under the Resource Conservation and Recovery Act and Superfund to allow for reasonable remediation measures and eliminate the problem of too many cooks in the kitchen, with thousands of State-authorized cleanups.

Indeed, ROSA places local site remediation in the right place, in the hands of State and local government officials, and not the Washington bureaucrats.

ROSA will also save this country $2 billion per year, by eliminating counterproductive measures designed to address unrealistic risks, reducing litigation and streamlining programs. This is the right proposal and now is the right time.

Anyone who has been following our Superfund reform efforts this spring, this summer and now this fall knows where I stand on liability. I put out a statement of Superfund reform principles in July, proposing full repeal of Superfund liability prior to 1987. I thought that was a great idea then and I still think it's a great idea today. It would make this program so much more efficient and get rid of a tremendous amount of gross unfairness created by Federal law that it seems to me like an irresistible proposal.

The problem is that we need to assure adequate funding and maintain the pace of cleanups. We cannot do both, given current funding levels. We've been trying hard to achieve these objectives. If an appropriate and adequate source for full funding can be developed, I will support greater liability reform.

ROSA is the best package our money can buy. I am very proud to be here today as the chief author of this bill. Let me just mention the liability reforms briefly.

We get rid of an enormous amount of litigation by removing liability for municipal landfills and get roughly half of the small businesses involved in Superfund completely out of the liability web with a 1 percent de minimis exemption.

Furthermore, for the PRP's who we cannot afford to remove from what often becomes a morass of injustice, we are able to provide a retroactive liability discount.

Chairman Bliley and I are fully behind this bill. Over in the Transportation and Infrastructure Committee, Chairmen Shuster and Boehlert are both backing this bill, and that's, believe me, no small accomplishment.

This morning we heard from Congressman Tom Roemer, and other members who plan to be original cosponsors of the bill.

This has been a methodical process. The subcommittee has had 7 hearings and held 10 briefings by the administration, States, environmental groups and businesses for legislative assistance. I delivered a comprehensive framework in July and received nearly 100 comments from our efforts. Committee staff, working with the staff of the Transportation and Infrastructure Committee, has held numerous bipartisan meetings, in July, August and early September, with many focussing on the critical issues of cost and funding. I've distributed draft language in mid and late September for comment.

I am prepared to discuss small and large issues and make revisions through the amendment process. But if you're sitting on the sidelines, it's because that's where you want to be. And if you cannot make legitimate compromises to ensure policy and political success, I'm going to have a hard time with that. There is too much benefit in this package to follow last year's pattern and fail to move it to the floor.

My message today is clear: ROSA has legs and she's going places. Those of you who are out there waiting for something better to come along had better start thinking fast because we don't have time to waste. I look forward to hearing from today's witnesses on this package.

And I now have the distinct honor to turn to our new pending ranking member, the gentleman from Oregon, Mr. Wyden.

Mr. WYDEN. Thank you very much, Mr. Chairman. I want you to know that I am very much looking forward to working with you. We came together 15 years ago and I know that you're not going to hold it against me that a Democrat won the House free throw shooting contest. I know we're going to work well together.

Mr. Chairman and colleagues, there's no serious dispute that the Superfund program is badly in need of reform. It simply hasn't achieved the goal of cleaning up abandoned toxic waste dumps and other contaminated sites in an efficient and cost-effective way.

What is needed is responsible reform in the statute to eliminate overly prescriptive requirements and make cleanups faster and less costly.

At some sites, the Superfund law's requirements has led to bureaucratic overkill. There's a general consensus, reflected in last year's bipartisan bill, on the need to cut back on past excesses, such as requirements to incinerate dirt with low levels of contamination. But let us avoid extremist ideas, such as eliminating requirements to treat polluted drinking water and hot spots with dangerously high levels of contamination, or to override applicable State cleanup statutes.

And there certainly are better ways to address legitimate problems than to throw the entire program into bureaucratic limbo. Under the Reform of Superfund Act, the ROSA legislation, EPA would have to revisit 15 years of final Superfund cleanup decisions at over 700 sites across the country. It is hard to understand how this exercise in nostalgia is going to speed up anything.

Superfund is already a lawyer's full employment program, and when you consider that the results of EPA's review can be challenged in the courts, this could easily turn into the longest running battle since the Trojan War.

There are flaws in the Superfund program, but the bottom line remains that there are contaminated sites that must be cleaned up. One prime example is in my home State, in my district, the East County groundwater contamination site. This site is in an area that contains 22 wells that the city of Portland uses as a back-up source of drinking water for more than 700,000 individuals in the Portland area. Groundwater at the site is contaminated from the dumping of industrial solvents that contain probable cancer-causing compounds. As a result of this contamination, only about a half of Portland's wells are currently safe to use in a water supply emergency.

Two years ago, Portland had to tap East County wells when drought caused the Portland reservoirs to be drawn down to dangerously low levels, and the city's current plans for tapping the wells on a regular basis, not just emergencies, are being examined for the near future.

Under the ROSA bill, Portland's decision to restore its wellfield so it can again be used as a drinking water source could be second-guessed by officials in Washington, D.C. But even if Portland's desire to restore the site to drinking water use is respected, decisions about how and when the cleanup could proceed would be subject to an endless array of legal challenges.

In the meantime, the city of Portland would be left high and dry. Without full access to the wellfield, our water system would be hard-pressed to meet the growing needs of both our expanding population and businesses in the region, particularly the burgeoning computer chip industry, which is locating plants across Oregon. Computer chip manufacturers need substantial quantities of pure and clean water because chip-making involves repeated rinsing to wash away impurities.

The East County site in my district is a case where contamination itself, not the Superfund liability scheme, is, in effect, hamstringing future economic development. If that site isn't cleaned up, Portland may not be able to meet the needs of the chip industry, and economic opportunities and jobs in our region could be lost.

Under the ROSA approach, it is not clear to me that the East County site and other sites around the country that are current or future sources of drinking water would be cleaned up in time to meet local needs. We would, in effect, be playing Russian roulette with the Nation's water supplies, putting at risk both public health and economic development.

Let me conclude by way of saying that I believe it's possible to achieve both real reform of the Superfund program and real cleanup of sites that urgently need it, like the East County site in my district.

And Mr. Chairman, I want you to know that I look forward to working very closely with you in a bipartisan way to achieve these objectives.

Mr. OXLEY. I thank the gentleman and welcome him as our ranking member.

The gentleman from California, Mr. Bilbray.

Mr. BILBRAY. Thank you, Mr. Chairman. Mr. Chairman, I'd like to thank you for bringing forward this Superfund Reform Act of

1995. I think ROSA may have some parts that some people may be concerned about but I think that in all fairness, when we got to reform a very old strategy that seemed quite appropriate at the time but, as those of us who have had to work with the Superfund strategy have pointed out, it had major blemishes in the old strategy, and I think ROSA is a marked improvement.

I say this as somebody who operated in a county of 2.5 million that had to address the hazardous waste problems. And I guess the real thing that ROSA recognizes is that the old concept that you can never have too many regulations, too much Government intervention, too much Federal intervention, when it comes to environmental issues, I think ROSA recognizes there is a point where not just the business community but for the environment and the quality of life of our constituents can be impacted by overcontrol from the Federal level.

I was very encouraged by seeing colleagues from both sides of the aisle pointing out the brownfield problem. For too long we have assumed in Washington that if a little bit is good, then a whole bunch is great. And if a little bit of regulation gets the job done, then a whole bunch of regulations must solve all our problems. And, in fact, it's done just the opposite, and the brownfields is probably a good example.

Our colleagues from both sides of the aisle pointed out that this is not just an economic problem in certain areas of this country but it's an environmental issue. And I think too often we avoid admitting that sometimes our environmental strategies do have adverse environmental impact, and the brownfields is probably a classic example.

Not only are we talking about land in the inner cities that could be used instead of those farmlands on the edges of the suburbs, but we also need to recognize the air pollution impacts which occur by encouraging urban sprawl through the use of these inappropriate regulations. We are allowing the brownfields to lay vacant while old farmlands are paved over with new subdivisions, and need to recognize the energy consumption that is related to that, and then the related air pollution impacts.

I think so often, we look at these situations in isolation, and the old legislation did, that we didn't see the big picture. And I'd ask my colleagues from both sides of the aisle to look at the big picture. ROSA is a giant leap forward into a brighter future that not only recognizes the interrelationship of economic and environmental issues, but also recognizes the impact on those of us here in Washington when we talk about trying to make sure that our funds, the public funds, are invested and used appropriately.

The brownfields not only cause urban sprawl, Mr. Chairman, but it breaks up the infrastructure in urban cities. One example might be our transit money that is not being used appropriately, because every time there's a vacant lot in the inner city that is not being utilized, that's one less market for our transit system; that's one less resource that we could be tapping into for our communities.

And I would just like to point out that both sides recognize this is a problem. This is not a Democrat or Republican proposal. This is really a recognition that things don't always turn out as we planned, and let's be brave enough to move forward and improve

on the strategies of the past, but let's not be tied to those. Let's not assume that just because things were done one way 20 years ago, they're the best that we ever could do.

And I hope that this can be the first step into an environmental renaissance where we start questioning the old strategies and find better ways to do the things that we always said we wanted to do. And I think that the benefit will not just be economic; I think it'll be environmental.

And those of us that care about the environment, I think, recognize that we need to find ways to do things better. Thank you, Mr. Chairman.

Mr. OXLEY. I thank the gentleman.

The gentleman from Ohio, just last night I was trying to figure out why he wasn't participating in the annual charity congressional basketball game at Galluadet and then I realized, of course, that he had a higher calling and why he's in such an enjoyable mood today, rare good mood, and I recognize my good friend from Ohio.

Mr. BROWN. Mr. Chairman, I would make this point, that since World War II the Republicans have had control of this institution 3 times. They took control in 1946 and that same 2-year period the Cleveland Indians went to the World Series. Then in 1948 the Democrats retook control. Then in 1952, the last time the Republicans were in control before this, the Indians went to the World Series during that 2-year period and the Democrats again retook control.

When the Republicans won in 1994, all of us Republicans and Democrats alike in Ohio were pulling for an Indians World Series but the Republicans didn't understand what that really meant politically. I would just add that for the 1996 elections.

Mr. OXLEY. Are you also indicating that your absence last night may have been the reason why the Democrats lost?

Mr. BROWN. That was very important. I contributed my money to the charity but it was very important that the Indians make the World Series in order for them to determine the outcome of the 1996 election so we can get back down to work, Mr. Chairman.

Thank you, Mr. Chairman, for the opportunity to say a few words about the Superfund bill. Obviously, Superfund reform is long overdue and it's clear; I think all of us agree that we need to ensure that taxpayer dollars are used more for cleanup and less for lawyers' fees.

We must ensure, however, that those dollars are used for cleanup, not simply for putting fences around an area in a quick retreat, not for letting polluters off the hook, not for reducing the standards which ensure cleaner air and cleaner water.

And as we extol the virtues in this institution the last 9 months, we extol the virtues of personal responsibility for welfare recipients, I think it's important that we don't allow corporate America to abdicate their personal responsibility at the same time.

Upon first glance, I'm concerned that ROSA would repeat retroactive liability without adequate funding and without assurances that these sites will indeed be cleaned up.

We must not, through the reform of Superfund, exacerbate our Federal deficit. We must not, though not fully comprehensively, completely paying for repeal of retroactive liability, not engage in

smoke and mirrors, like we have too often in this body, to balance the budget and to pay for this repeal of retroactive liability.

Further, we must ensure that sites are cleaned to a standard which ensures the protection of the public, not a cheaper, lower standard.

I'm encouraged, Mr. Chairman, that the bill would include certain provisions similar to those in my legislation, H.R. 2178, which provides incentive for the development of brownfields. Protection for potential purchasers and potential lenders for the development of these properties is particularly important.

I'm encouraged by the testimony particularly of Mr. Regula and Mr. Visclosky in their support of brownfields reform. I think that is certainly a key element of this bill.

I applaud the chairman's involvement in including many of those provisions in ROSA and I think that we can move forward on that. Thank you, Mr. Chairman.

Mr. OXLEY. I thank the gentleman. The gentleman from Georgia.

Mr. NORWOOD. Thank you, Mr. Chairman. I appreciate you continuing to work with me on ROSA. In view of the fact that you had a very unhappy night last Saturday night with the Reds down in Atlanta, I appreciate your continuing response.

I'd like to tell my friend from Ohio I'm afraid the results for the Indians in the World Series is going to be much like the results for the Democratic Party in the 1996 election. You're going to lose.

I thank you very much for having this hearing, Mr. Chairman and I thank you further for pushing Superfund reform this year. This is one of the items in our Government that obviously needs to be reformed. And I think on this point, there really is no debate.

I know that last year attempts were made by my friend Mr. Dingell. However, I don't believe that went quite far enough.

A further point, to prove that there is no debate on the need for reform, is the statement of the woman in charge of this administration's Superfund efforts, the head of the EPA, Administrator Carol Browner. When enumerating just part of the problem with Superfund, let me quote Ms. Browner. She says, "A lot of time and money is taken up with companies suing each other over how much they owe to clean up a particular site."

Liability and litigation costs are not the only problems obviously. Remedy selection, cleanup standards, wasteful Government bureaucracy, natural resource damages and other problems certainly exist. In order to put the problems of Superfund into perspective, we have to look at how and why it was created.

Superfund was created in 1980 and hastily signed by then-President Jimmy Carter in December, less than 1 month before leaving office. And Superfund at that time was in response to the outrage that we all witnessed at Love Canal in New York. It was designed initially to be a short-term program, intended to last about 5 years at a cost of approximately $1.6 billion.

Well now, it's been 15 years later, $20 billion has been spent, and only 5 percent of the Superfund sites are clean.

Mr. Chairman, the system is obviously broken and it is our responsibility for the future of the health of our children to fix it. In looking at this as a program designed to protect the public health, we have to ask ourselves: Is it more important to clean the sites

and remove possible hazards, or is it more important to punish those who have deep pockets and may only be on the periphery of responsibility or maybe even not responsible at all?

Being a health care provider, I'd opt to clean these sites up over giving trial lawyers more money. We take many of the steps necessary to fix the problems by moving toward 3 common sense goals: giving the States a greater role over the control of these sites, using just plain common sense, being site-specific in cost-effective management of the sites, and reforming the wild liability system so as to bring about more fairness and lower the out-of-control transaction costs.

I have more specific concerns as it comes to our dry cleaning industry. However, those will be addressed, Mr. Chairman, at a different time. In the meantime, I look forward to hearing from out witnesses today and working with you, regardless of the outcome of the playoffs. Thank you, Mr. Chairman.

Mr. OXLEY. I thank the gentleman. The gentleman from Massachusetts, Mr. Markey.

Mr. MARKEY. Thank you, Mr. Chairman. I personally want to offer my congratulations to you, as player-manager of the Republican basketball team last night. Not since Lou Boudreau for the Cleveland Indians has a player-manager of such extraordinary vision and professional competence taken a team to victory by such a small margin of victory despite the great talent gap that existed between the winners and the losers.

One of the problems, as you probably all know, with the Democratic team is that after 20 years in Congress, I am still considered to be a young Democrat, and Mr. Oxley had the benefit of having well over 75 percent of all the points scored by his freshman in the game last night.

Mr. OXLEY. We had a good draft.

Mr. MARKEY. He had a good draft. We don't have any freshman Democrats. We're hoping for a better draft in 1996 or else the prospects for the future are indeed gloomy for the Democratic basketball team.

Mr. Chairman, we are here today to discuss, in the first of 2 oversight hearings, the Reform of Superfund Act of 1995, known as ROSA. As we consider reform of this important, although much maligned, environmental law, we should not lose sight of why the Superfund program was originally developed.

The citizens of this country were outraged at the discovery of hazardous waste sites like Love Canal, Times Beach, and the Valley of the Drums, which placed the health and safety of many families in our country in jeopardy.

In the 15 years since Superfund was enacted, however, we now realize that the problems associated with these sites are more widespread and more complicated than anyone originally suspected. Critics rightfully point out that despite good intentions, cleanups are too slow, too much money is spent on litigation, rather than cleanups, and innocent people sometimes get caught in the Superfund liability net. It is clear that some reform of the current Superfund program is in order.

Now, some of my colleagues say that we should just wipe the slate clean and start over. Unfortunately, that is not so easy. We

already have a 15-year history with this program and we must deal fairly with all the parties involved. We have to deal with the communities that are affected by the hazards. People who live near Superfund sites simply want their communities to be safe and pleasant places to live. They want the sites cleaned up quickly. They want to be involved in the decisionmaking process. And they want these sites redeveloped so that their communities will not bear the scarlet letter of Superfund forever.

We must also deal with the business community, which is concerned about an equitable distribution of the Superfund financial burden.

Our role as legislators is to balance all of these concerns. Today we are discussing draft legislation which purports to address all the concerns people have about Superfund. Undoubtedly, we will hear today that ROSA will assure fairness on liability while providing for cheaper, faster cleanups.

ROSA really is quite a good name for this legislation. It paints a very rosy picture of our future. Cleanups will be done faster with less money and everyone will be happy. That would be wonderful. Unfortunately, now that we've had a chance to actually see the details, the bloom is off the ROSA.

This bill fails to strike a reasonable balance between the interests of the affected communities and the interests of the business community. The remedy selection provisions in ROSA will spawn a tidal wave of new litigation, which will slow cleanup at many Superfund sites across the Nation. The more lenient Superfund standards provided for in ROSA will not adequately protect the health of our citizens. By eliminating the mandate for permanent remedies in favor of quick-fix band-aid remedy approaches, we will, in effect, be creating national industrial production sacrifice zones.

Of all the proposed reforms in ROSA, however, I am most concerned about the drastic changes made to the current liability scheme which we hear may undergo even further revision to satisfy the interests of corporate polluters.

If the "polluter pays" provisions are eliminated from the law, it is clear that the Superfund program will become a huge Federal public works project where the American taxpayer will have to foot the bill to clean up the mess left behind by others who did the pollution but who now will not have to pay.

Although title II, the liability provisions, are not the focus of today's hearings, I believe they must be considered when evaluating every other aspect of this proposal. Title II is like the loose thread in your sweater. Once you pull on it, the whole sweater falls apart.

If you take out the strong liability provisions of the current Superfund law, the prospect of getting these sites cleaned up in a timely fashion completely falls apart.

Mr. Chairman, I look forward to hearing the testimony of the witnesses this morning. I also look forward to having some actual legislative hearings on this bill after it is introduced, if there are additional changes made in the liability provisions before we actually have a bill before us so that we can fully assess its impact on public health, on safety and the environment.

With that said, I do want to work closely with you, Mr. Chairman, and with all the members of the committee because I do be-

lieve that Superfund reform is necessary. It's just my hope that we do it in a way that ensures that these sites do get cleaned up and the right people have to pay for the cleanup, and that means not the taxpayer but rather, those that polluted. I thank you, Mr. Chairman.

Mr. OXLEY. The gentleman's time has expired. The gentleman from Idaho, Mr. Crapo.

Mr. CRAPO. Thank you, Mr. Chairman. Before I begin, and I wasn't here when we started this round but Mr. Upton has asked if he could get unanimous consent to submit his statement, and I don't know if that was already taken care of.

Mr. OXLEY. The Chair would ask unanimous consent that all members' statements be made part of the record at this point, which would obviously include Mr. Upton.

[The prepared statements of Hon. Fred Upton and Hon. Paul E. Gillmor follow:]

PREPARED STATEMENT OF HON. FRED UPTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Thank you, Mr. Chairman. I shall be characteristically brief, as I have no wish to delay what should be the final set of Superfund hearings.

The flawed rules and regulations that currently govern the Superfund program have cost mom and pop businesses throughout my district, millions of dollars. This is why I call "Superfund" the "Super Headache." Misplaced liability and unfair lawsuits are driving these businesses into the ground, taking jobs with them.

The Oxley bill is a firm step in the right direction. It provides the reform so desperately needed to effectively and efficiently clean-up polluted lands, while cleaning-up the bottom line.

If this is the final set of Superfund hearings, Mr. Oxley, no one in American will deserve more credit than you. You have been indefatigable in your efforts to repair this high flawed program. You haven't gotten a lot of support from some quarters. Still you have persevered. I fervently hope you won't have to wait until Heaven for your reward.

I've said it before and I hope I won't have to say it again: Superfund is the poster child for the Law of Unintended Consequences. It was supposed to ensure the rapid cleanup of contaminated sites. It has instead ensured the cleanup by lawyers. I'm not sure which event causes me the most heartbreak: Coming so close to Superfund reform last year and ultimately falling short or not going to law school. No use crying over spilt milk...or chemicals.

It's time to fix it. Mr. Chairman. Let's get it done.

PREPARED STATEMENT OF HON. PAUL E. GILLMOR, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

Mr. Chairman, in one of Mark Twain's finest literary pieces, his character Tom Sawyer is charged with the duty of cleaning-up and restoring an old fence. This is not a task that young Tom desires and he sets out to find ways to get the job done without going the previously prescribed route. Eventually, flexibility, innovation, and ingenuity win when Tom is able to co-opt his friends into painting the fence. And, that is where I believe we are today with this Superfund bill.

After months and hours of hearings on the subject of reforming Superfund, we are finally where we need to be. This program's goal of cleaning up hazardous waste sites has become muddled in side issues. Instead of giving money for remediation, we see funds being spent on consultants, lawyers,and studies. I believe the time has come to re-examine the way we have done business in the past and find innovative and pliant ways to make Superfund work. I believe this bill does just that.

My own feelings are that repealing the liability scheme in Superfund was the best way to reduce costs, minimize litigation, and speed cleanups. However, I have come to believe that our budget situation mandates that we cannot go that far. It is my hope that someday we will be able to reach that plateau, but until then it is important that we pass sound public policy that does not over-extend the resources of the Federal Government, protects the solvency of small businesses and municipalities, and holds the "feet to the fire" of major polluters.

I am especially pleased with this bill's effort to include risk assessment and cost-benefit analysis in the remedy selection title. It is important that we get these sites cleaned up as promptly as possible, but as Twain taught us, "there is more than one way to skin a cat." This legislation will not make the heftiness a remediation's price tag the best barometer for a specific clean up action. I strongly believe that with the limited amount of resources that we have available to us, we need to concentrate on using them in the most prudent way.

Very quickly, I also want to mention my support for the voluntary cleanup and state role provisions in this bill. I believe the committee recognized not only that many companies may want to clean up their waste sites without the impending feelings of Superfund horrors hanging over them, but that there is becoming an increasing and important role that states can play in the overall Superfund picture.

Mr. Chairman, our committee will hear from various parties who have strong feelings about this bill. I look forward to hearing from them on this issue. This committee started the work of making Superfund a better program last year. A year later we are older and wiser in the ways of Superfund reform. I commend the hard work of you and your staff and look forward to finally getting this fence painted.

Mr. OXLEY. Mr. Crapo.

Mr. CRAPO. Thank you, Mr. Chairman.

Mr. Chairman, before I make my prepared remarks, I do believe I'd like to comment on the question that has been raised as to whether those responsible for the pollution in this country are going to be removed from the responsibility of payment or alleviated from some burden.

I think one thing should be clear to everybody, and that is that although we have a lot of great rhetoric in the last few years about the polluter pays, but what happens under the current system is that remedies don't actually end up occurring. And although there is a lot of paying being done by a lot of people, in court and in taxes and in other ways, there is very little water getting to the end of the row, if you will, in terms of money getting applied to solutions, and this bill is going to accomplish that.

Second, I think it's important to note that the taxes that are paid to fund the Superfund reform and the Superfund cleanup are paid by corporate America. They're paid by the petroleum and chemical companies. They're paid by those who are so often attacked as being responsible for the problems in this country.

And I think that it would be a mistake to say that these taxes are being paid by the average American taxpayer, with the implication being that they are being paid by the individual taxes, like our individual income taxes or something like that. These are specifically oriented taxes aimed at those industries that are involved primarily in Superfund cleanups, and I think that that point should be made.

The real question here is how do we make the act work, not how do we place blame and how do we go around pointing fingers at one another while cleanup doesn't happen and, as has been said here, the act continues to be basically a source of litigation and endless studies.

I'd like to thank the committee for holding these hearings and state that if anything, I would like to encourage the committee chairman and the members of this committee to move ahead as quickly as we can to get something done this year. I know that we've got to work closely with the Senate and I think it's important for us to move ahead with this legislation so we can get into play and get this issue resolved. We have good legislation before us.

One of the big concerns to me in the entire issue is remedy selection and frankly, a big concern I have relates to the lead in soil remedy issue. In many of the hearings that this committee has held over the last 2 or 3 years, I've talked about a community in my State, Triumph, in which we have had a long-standing battle to keep the community off the National Priority List relating to issues surrounding lead in soil.

Soil removal is not only exceptionally expensive but it is time-consuming, aesthetically unappealing and negatively affects property values, poses health risks, and there isn't really agreement in the scientific community that soil removal results in the lowering of children's blood levels at all. In fact, as I've said before, when they tested—the town of Triumph in Idaho is just a very small town. There are a little more than 100 people in it. They tested every single human being in the town and they did not have increased blood levels. In fact, they were below the national average.

In her testimony, Donna Rose pointed to a specific lead model known as the IEUBK, which is currently unvalidated. At Triumph this test predicted a greater than 5 percent probability that an exposed individual's blood level would exceed 10 micrograms per deciliter, the Centers for Disease Control's level of concern. However, none of the children at Triumph had blood levels exceeding this level.

Unfortunately, the use of the IEUBK at Triumph is not an isolated incident. I can cite similar situations in Leadville, Colorado and Midvale, Utah, to name a few in which the EPA has used this model to make faulty predictions.

The current proposed Superfund language does not effectively address the EPA's soil removal policies nor its use of the unvalidated lead model, and I suggest there's more constructive language for preventing future travesties such as those that have occurred at Triumph and Leadville and Midvale.

And the language should be added to the bill to prevent the EPA from future use of unvalidated models, including almost immediately the bank rescinded loans already in process.

EPA has given Triumph the highest hazardous ranking system score in the Nation at this time, yet the blood levels in the town rank not only far below the national average but far below the level of concern.

Mr. Chairman, the IEUBK model cannot continue to be used to justify soil removal response actions until we have more validation taking place. In addition, language should be added to require the EPA to meet certain conditions before mandating lead-containing soil removal actions.

EPA's lead-in-soils policy is fundamentally flawed. Without significant changes to the current legislation, towns and communities will continue to suffer the fate of Triumph. This subcommittee stands poised to effect changes in an environmental policy that all parties agree is fatally broken, and I encourage that we continue to revise and improve the act, but move forward expeditiously, as I've suggested.

Thank you, Mr. Chairman.

[The prepared statement of Hon. Michael D. Crapo follows:]

PREPARED STATEMENT OF HON. MICHAEL D. CRAPO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF IDAHO

I would like to thank the committee for holding these hearings on the proposed reauthorization legislation of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), better known as Superfund. Reauthorization of this act is important to me and my State, and I appreciate the opportunity to once again play an active part in this reauthorization process.

This bill makes significant progress toward a Superfund mechanism that is responsive to community desires and State authority, without bankrupting local economies. Citizens, State and local governments, and industry stand to benefit.

However, as a representative of the "GEM" State where one of our largest industries is mining I find some areas of the legislation, particularly in Title I (Remedy Selection), that still need improvement.

In 1991 a tiny town in Idaho became engaged in a bitter fight with the Environmental Protection Agency (EPA) to keep itself off the National Priority List (NPL). EPA ran tests in Triumph and found lead in the water and lead in the soil.

Almost immediately the bank rescinded loans already in process. Residents were left with uncompleted property renovations and useless land. Just the potential for an NPL listing left the small town, of environmentally aware residents, with a stigma that still lingers, despite eventual State deferral. Property values plummeted and even those residents that were lucky enough to sell are left with future liability concerns.

EPA gave Triumph the highest Hazardous Ranking System (HRS) score in the Nation at the time. Yet blood-lead levels in the town ranked not only far below the national average, but far below the level of concern.

On March 16, 1995, at the general hearing on Superfund reauthorization, held by this same subcommittee, Donna Rose, a Triumph representative gave moving testimony to the problems with Superfund. She specifically highlighted EPA's attempts to force the town into accepting the initial lead test results, despite the citizens' own belief (based on Idaho health department blood lead tests) that they were as healthy as individuals in any other town in America.

In her official statement Donna said, "To our knowledge no person in our community nor any wildlife, has ever suffered any ill effects from tailings." Nonetheless EPA pressed for emergency soil removal actions.

Soil removal is not only exceptionally expensive it is time consuming, aesthetically unappealing, negatively affects property values, poses health risks, and there is no agreement in the scientific community that soil removal results in a lowering of childrens' blood lead levels.

In her testimony Donna Rose pointed to a specific lead model known as the IEUBK which is currently unvalidated. At Triumph this test predicted a greater than 5 percent probability that an exposed individual's blood lead level would exceed 10 micrograms per deciliter—the Center of Disease Controls level of concern. However, none of the children at Triumph had blood lead levels exceeding 10 micrograms per deciliters.

Unfortunately the use of the IEUBK at Triumph is not an isolated incident. I can sight similar situations—Leadville, Colorado, and Midvale, Utah to name a few—in which EPA has used this model to make faulty predictions.

The current proposed Superfund language does not effectively address the EPA's soil removal policies nor its use of the unvalidated lead model.

I suggest that there is more constructive language for preventing future travesties such as those that occurred at Triumph, Leadville, and Midvale. Language should be added to the bill to prevent EPA from future use of unvalidated models, including the IEUBK model, to justify soil removal response actions. In addition language should be added to require EPA to meet certain conditions before mandating lead-containing soil removal actions.

EPA's lead-in-soils policy is fundamentally flawed. Without significant changes to the current legislation towns and communities will continue to suffer the fate of Triumph, Idaho. This subcommittee stands poised to effect changes in an environmental policy that all parties agree is fatally broken. All possibilities towards this goal should be explored.

Mr. OXLEY. I thank the gentleman. The gentlelady from Oregon, Ms. Furse.

Ms. FURSE. Thank you, Mr. Chairman. I don't have a statement today. I want to hear the witnesses. I do appreciate having a hear-

ing, though, on such an important issue and I look forward to hearing the testimony. Thank you.

Mr. OXLEY. I thank the gentlelady. The gentleman from Queens.

Mr. MANTON. I thank the chairman. Queens is one of the boroughs that make up the City of New York and the State of New York, for those who are not aware. They have a team called the Mets there.

Mr. Chairman, I'm pleased to be here to continue discussion of many of the important issues that must be considered in order to responsibly reform the Superfund program. It's my hope that your hard work on this legislation and that of my colleagues on the committee will prove fruitful in delivering a bill that ensures cleanup of hazardous waste sites in a more efficient and effective manner while continuing to protect human health and the environment.

However, as I sit here today, after months of hearing and debate on the subject, I must admit to being disappointed by the fact that the majority has not yet introduced a Superfund bill. Clearly this hearing would be more useful if it was focused on the actual legislative language.

I'm further concerned that this year's efforts to reauthorize Superfund have not been a bipartisan process. It seems unlikely that a monumental undertaking such as Superfund reform can be successfully achieved without a more cooperative approach.

While this hearing focuses on the language of draft legislation, it is an important opportunity to gather more information from a wide range of concerned individuals and interest groups, many of whom have written and visited our offices.

There are apparently some issues in the draft that are the source of significant disagreement. These issues include the adequacy of the remedy selection process, the potential for increased litigation regarding cleanup plans, both before and during implementation, and finally, the liability and funding provision; all continue to frustrate attempts to reach agreement on a bill.

Mr. Chairman, as I've indicated throughout these hearings, I entered into the reauthorization debate in this Congress with an open mind and a belief that responsible reform of Superfund was necessary and possible. Based on the results of our efforts in the 103rd Congress, I maintain that that is still the case.

I look forward to hearing from the witnesses and I yield back the balance of my time.

Mr. OXLEY. I thank the gentleman. Just for the record, the Chair might point out that in terms of our efforts, this has been the most open process that we can possibly have. We've had meetings with stakeholders. We've had meetings with subcommittee staff, full committee staff, members throughout the process. We've had 7 hearings, 8 briefings by the administration, industry groups, environmental groups, 12 other briefings or meetings with various groups, with both majority and minority members and staff present.

We think that this issue has been very well vetted, that this hearing, along with our hearing next week with Carol Browner and other members of the administration, will clearly point out the issues that we have before us and we can proceed from there.

A great deal of the language that we have in our bill was taken directly from the bill that Al Swift worked on very well last year. Many of us were part of that process and I see this as an on-going process that was begun in the 103d Congress.

So we look forward to working with all the members on both sides of the aisle for what I think will be an historic bill that will truly solve the problem and make Superfund work once and for all.

The gentlelady from Arkansas.

Mrs. LINCOLN. Thank you, Mr. Chairman. I'd also like to applaud Chairman Oxley for all of his hard work and his willingness to work with us in trying to bring about some solutions, common sense solutions to putting Superfund back on track and making it work for the results which we all want to reach, and that is for cleanup. Without a doubt, I think we can all agree that this system is broken and program and it must be fixed.

I'd like to offer a special thanks for the early work that the chairman has done on the small business groups, as well as the scrap metal recyclers, and I'd just like to encourage all of my colleagues that we've got to work diligently under the leadership of Chairman Oxley to continue to move ahead, to come up with a reasonable, common sense and fair Superfund program that will produce the results that we're all looking for, and that is basically the capability of all of the interested parties to achieve the ultimate results of cleanup.

So I look forward to the testimony today and working with the chairman and the rest of the committee to come up with that end product.

Mr. OXLEY. I thank the gentlelady. I recognize the gentleman from New Jersey, who is not a member of the subcommittee but who has an abiding interest in the Superfund issue. Frank, we're glad to have you. Mr. Pallone.

Mr. PALLONE. Thank you, Mr. Chairman. I appreciate your holding this hearing on the remedy selection provisions of your legislation, ROSA, and also for being able to participate.

I'm listening to the references to ROSA, and of course we had SARA previously. I have to tell you I feel very close to this legislation. My grandmother's name was Rosa, my mother-in-law's name is Rosa, my daughter's name is Rosa—we took away the Italian and Anglicized it—and my wife's name is Sara.

As you know, I'm the sole New Jersey member of the Commerce Committee and therefore I need to be concerned and vigilant about any proposals to change Superfund. As Mr. Frelinghuysen said, New Jersey contains 114 Superfund sites. I had in my notes 113, but my assistant notified me that a new site has been added in my district over the last month or so. But we still have the most of any State in the Nation.

I guess I should point out that I'm not an ardent defender of the EPA. In fact, I'm often criticizing the Agency for not effectively handling Superfund sites. But in recent years they and the program have gotten better, and I think they should be given the chance to improve.

SARA specifically has been in place for less than 10 years and in terms of the science of remediation, we're only just now moving out of infancy. We need to be very careful about the changes we

make to the remedial process or else we will find ourselves back here in 8 or 10 years arguing over the problems of untreated Superfund waste or leaching caps. Similarly, we need to take care that in our attempts to reform the liability system, we don't destroy the whole program.

With that in mind and with due respect to you, Mr. Chairman, I'm concerned about a number of provisions in this draft legislation, including Government-funded reimbursement to PRP's for ongoing cleanup, multiple exemptions from liability for polluters, remedy selection based on cost rather than human health priorities, elimination of groundwater and aquifer protection, language that would allow polluters to halt cleanups through petition and litigation, exclusion of citizens and citizen groups from the remedy selection criteria in some instances, capping the total number of Superfund sites, and eliminating the preferences for permanent treatment of the most toxic and mobile contaminants.

And remedy selection, the subject of today's hearing, is one of the most important aspects of the Superfund process. In SARA, a few years ago, Congress included a provision that was to serve as the legal standard upon which cleanups would be based. That provision, which became CERCLA section 121, established standards for the method and scope of a remedial action.

Prior to SARA's enactment in 1986, Congress was troubled by the fact that many of the remedies that had been selected by EPA were not permanent in nature. Rather than attack the contaminants and attempt to render them harmless, many of the remedies opted instead to contain and remove contaminated material from a given site.

The result was that many sites that were cleaned became storage sites for the same contaminated materials, or the contaminated materials were sent to another facility for storage. Many, both in and out of Congress, began to see the potential for Superfund to become nothing more than an expensive shell game.

So, with this in mind, our colleagues saw fit to include language in section 121 that established a preference toward the selection of permanent solutions in cleanups, and I believe that this preference makes sense.

I'm concerned because, if I could give you an example of 2 sites in my district that I think the proposal could negatively impact in terms of the cleanup. First, the Chemical Insecticide Corporation, one of the worst Superfund sites, which is in Edison, New Jersey.

Because this legislation makes cost control as high a priority as human health protection and removes the law's mandate to permanently treat waste, in my opinion, the CIC cleanup would have ended now that the site is capped and fenced. Under this legislation, groundwater protection is considered unimportant unless the polluted groundwater poses a very direct threat to drinking water. So again, there would be no further cleanup of the groundwater at CIC.

Finally, there would be no off-site cleanup at CIC because the bill allows no remedial actions to be taken to protect ecological resources except under very narrow circumstances.

If I could use another example of the Kin-buc site, again a very contaminated site in Edison, in my district, today polluters are

cleaning up that site. However, under this legislation, the Government would be picking up the tab for the cleanup of that site because of provisions in the bill exempting polluters from liability. Because the landfill accepted common household waste in addition to hazardous chemicals, the landfill would be deemed a co-disposal site under the draft and the cleanup costs would have to be borne by the Government rather than the polluters.

Of even more concern to me, the polluters would have to be reimbursed for their continued services at Kin-buc, since the cleanup is still on-going.

I just mention those as examples, and I believe we've now come full circle. The last time we substantially altered Superfund, Congress mandated stronger cleanups and permanent treatment. Now I'm concerned that we're just sweeping the dirt under the rug. Before, we had polluters pay, and now, in some circumstances, we're paying the polluters.

So again, I'm concerned, with the most Superfund sites in the Nation in my State, that this is really going to have a negative impact.

I know we'll be hearing from the witnesses and I'm hoping that some of my concerns will be cleared up and that maybe they're not as severe as I'm stating, but these are the things that are being brought to my attention and I hope that we can address the reauthorization in a way that doesn't have these negative impacts.

Thank you, Mr. Chairman.

Mr. OXLEY. The gentleman's time has expired. This ends the time for opening statements for the members. The Chair would indicate that before we recess for the vote on the floor, I would like to read a statement from the Chair.

All of us on this subcommittee, including the staff, were deeply saddened to learn this morning of the death of Mrs. Elvira Freeman Laws. Mrs. Laws is the mother of Elliot Laws, EPA's highly respected Assistant Administrator for solid waste and emergency response, a gentleman who has testified many times before our committee.

Our sympathies are with Elliot and the entire Laws family at this time of loss. At the end of the road, the greatest riches providence can bestow on any parent is a child known for integrity, character and achievement. Mrs. Laws clearly died a wealthy woman.

The Chair now stands in recess for 15 minutes.

[Brief recess.]

Mr. OXLEY. The subcommittee will come to order.

The Chair is pleased to welcome our panel, panel 2: Jim Colman, who is the assistant commissioner for the Bureau of Waste Site Cleanup for the State of Massachusetts and Chad McIntosh, deputy director for the Michigan Department of Environmental Quality. We'll begin with you, Mr. Colman. Welcome.

STATEMENTS OF JAMES C. COLMAN, ASSISTANT COMMISSIONER, MASSACHUSETTS BUREAU OF WASTE SITE CLEANUP, ON BEHALF OF ASSOCIATION OF STATE AND TERRITORIAL SOLID WASTE MANAGEMENT OFFICIALS; AND W. CHARLES McINTOSH, DEPUTY DIRECTOR, MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY

Mr. COLMAN. Thank you very much, Mr. Chairman and members of the committee. I am James Colman, the assistant commissioner for waste site cleanup in the State of Massachusetts. I'm also the primary spokesperson on reauthorization issues for the Association of State and Territorial Solid Waste Management Officials, and I'm here representing ASTSWMO this morning.

CERCLA reauthorization is obviously an extremely important issue for State waste managers. We are out there every day dealing with potentially responsible parties, community groups, local governments and a whole variety of stakeholders in Superfund cleanups. Therefore, we have put a lot of time and energy over the last couple of years into this issue.

Specifically, over the last several months we have strived to work cooperatively with your staff to provide constructive and balanced input. The openness shown by your staff during this process is reflected in the discussion draft we have before us today.

We all share a fundamental belief that CERCLA must be reauthorized and needs to be changed. Our goals have and still include the following: the continuation of the protection of public health and the environment, more streamlined and faster cleanups, and maintaining adequate funding. And, as one of the key mechanisms to achieve these goals, we have advocated a greater role for States. We have developed and submitted previously a comprehensive proposal to achieve these goals.

We believe that this draft bill is a good start to meeting our shared goals and that, although several provisions in the draft bill are not our preferred approach, the bill can be implemented. Therefore, our comments this morning are intended to be supportive, but also be quite clear about further improvements which we believe will make this an even better bill.

I would like to make some general comments about the key titles. First, remedy selection. We well understand and agree with the need to contain costs and to streamline the remedy selection process. To that end, we would have preferred a remedy selection process based on national standards and which uses a disproportionate cost test formula. However, the proposed five-factor remedy evaluation process will work, in our view.

There are three key provisions with which we do not agree. The first two relate to ROD review: (1) judicial review of ROD's and (2) the reopening of ROD's. We believe that these may delay, not streamline cleanups, as is explained in more detail in our written testimony.

Finally on this title, and most important, we are disappointed about the preemption of State-applicable standards. It seems ironic that this bill finally gives States an opportunity to take over NPL sites, yet does not allow us to use our own standards.

The second title, liability. As State waste managers, our first concern is ensuring timely and effective cleanups, and this requires

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that there be adequate funding. To date, the current liability scheme has done this. However, we recognize the clear need to deal with certain inequities caused by that scheme and agree in concept with the carve-outs and exemptions that you have provided in this title. We think that will help.

Title III, brownfields. Brownfields, as has been mentioned previously this morning, is an increasingly important issue and many, many States are working hard to reduce the obstacles to cleanups in redevelopment caused by our own, as well as Federal Superfund statutes.

By dealing with the dual liability at non-NPL sites and providing assistance to State development of voluntary cleanup programs, you've really gone a long way to help this problem, and we appreciate that very much.

On NRD, we believe that the way this title is written will enable trustees to continue to provide a level of primary restoration for injuries to natural resources caused by these sites. We do have three recommendations, however, which we think would improve it.

First, we think that in order to provide clarity and certainty to all parties, the statute of limitations should be clarified. We believe that the trustee should be allowed to use funds from the trust fund for assessments. That would speed up the process and make it all go smoother.

And finally, we believe that the definitions of "cost-effective" and "cost-reasonable" need to be refined.

On State role, we obviously like this title a lot. It gives States the opportunity to manage and oversee these sites which, after all, are in our own back yard. We think that the delegation process, the self-certification, the ability to be delegated some or all of the program and the reimbursements to States for emergency response are excellent features of this title. There are two areas, however, where we think it could be improved.

First, we think that the bill should go beyond delegation and allow for authorization so that we can really take advantage of the tremendous amount of innovation that has occurred at the State level over the last several years and would provide even greater flexibility for cleanups and make them go faster.

And second, we do not agree that the NPL should be capped. In our experience, we believe there are many more NPL-caliber sites out there and that capping them at 130 more sites would be not the direction we would like to go.

And finally on this section, although we like the 10 percent cost share approach, something we've been advocating for some time, some States are concerned that this will end up costing States more in the long run, given the likely increase in fund-financed sites and our concern that the OMB petition process may not really address this issue.

On title IX, the remediation waste management title, we like this title. It should go a long way to reducing red tape and process at Superfund sites since those wastes can certainly be adequately regulated on-site by Superfund managers, and the RCRA program is definitely an obstacle.

In conclusion, again we believe this draft bill is a good start to reforming the Superfund program. We have appreciated the open

process exhibited by the workings of the committee over the past several months and look forward to working closely with you. We trust as these reforms continue to take shape, State waste managers will continue to find this an implementable bill and we will continue to work with you to achieve that outcome. Thank you very much.

[The prepared statement of James C. Colman follows:]

PREPARED STATEMENT OF JAMES C. COLMAN ON BEHALF OF THE ASSOCIATION OF STATE AND TERRITORIAL SOLID WASTE MANAGEMENT OFFICIALS

Good morning. I am James C. Colman and I am the Assistant Commissioner for the Massachusetts Bureau of Waste Site Cleanup. I am also the primary spokesperson on reauthorization issues for the Association of State and Territorial Solid Waste Management Officials (ASTSWMO) and am here today representing ASTSWMO. ASTSWMO is a non-profit association which represents the collective interests of waste program directors of the nation's States and Territories. Besides the State cleanup and remedial program managers, ASTSWMO's membership also includes the State regulatory program managers for solid waste, hazardous waste, underground storage tanks, and waste minimization and recycling programs. Our membership is drawn exclusively from State employees who deal daily with the many management and resource implications of the State waste management programs they direct. As the day-to-day implementors of the State and Federal cleanup programs, we believe we can offer a unique perspective to this dialogue and thank you for recognizing the importance of the State perspective in this Superfund debate.

Over the past few months we have strived to work cooperatively with your staff and to provide constructive and balanced input. The openness shown by your staff during this process is well reflected in the October 12, 1995 Reform of Superfund Act discussion draft hereafter referred to as ROSA. While many of our goals for the program may not be similar, we are in agreement that Superfund needs to be reauthorized this year. Therefore, even though, many of the approaches advocated in ROSA may not be our preferred choices for implementing the program, we do believe that ROSA will adequately meet the programmatic needs of the implementors and provide for the continued protection of human health and the environment. We trust that as this legislative process unfolds and additional reforms are considered, that we will continue to be able to view this legislation in that light.

Today, I would like to provide ASTSWMO's overall assessment of the primary titles of ROSA and offer a few recommendations for its continued improvement.

TITLE I—REMEDY SELECTION AND COMMUNITY PARTICIPATION

We understand that the Congressional drafters have chosen to predicate the Superfund remedy selection process on containing cost and have made this a primary concern and reform goal during this reauthorization of Superfund. As State Waste Managers, we also recognize the need to contain costs and to streamline the Superfund program. To that end, we originally advocated and would have preferred a remedy selection process which is based on national standards and where remedial cost is measured via a disproportionate cost test formula, rather than through a time intensive cost-benefit analysis. Nonetheless, we agree with the proposed factors used to balance the remedy selection process, i.e., effectiveness of the remedy, reliability of the remedy over both the short and long term, risks to the affected community, acceptability of the remedy and the overall reasonableness of the cost. As regulators, we simply would have chosen a more streamlined approach, but concur that the process as outlined in ROSA is implementable as long as the costs and benefits of any remedy are arrayed over the life-cycle of the site. One cautionary note, however, is that with the combination of cost-benefit analysis and site-specific risk assessments, this Subcommittee must understand that the length of time associated with the cleanup process could be increased if the implementors of the program are forced into an excessive level of detail through the cost-benefit test. We would be happy to work with you to ensure that this does not become the case.

Two other areas of this title which we believe *will* cause delay in the cleanup process are the proposed changes to the judicial review process and the provision which allows for the review and possible reopening of all RODs, where the operation and maintenance has not yet been completed. We believe that allowing judicial review to commence upon the signing of the ROD rather than after the completion of the remedial action could extend the cleanup time associated with these sites by

many years. Should a court choose to stay a remedial action, sites will continue to sit fallow providing no economic or productive benefit to society, while lawyers continue to accumulate legal fees. Consequently, we urge the Subcommittee to delete this provision.

As for the issue of allowing RODs (where the operation and maintenance has not been completed) to be reopened, we question the wisdom behind this provision when resources of both the Federal and State governments and those of the responsible parties are dwindling. State governments simply do not have the resources to review sites where the remedies have already been chosen, since the total State universe of sites requiring remediation numbers in the thousands. We do not have the luxury of time to be second guessing past decisions. While we would prefer to see this provision deleted, if it is retained, we would urge you to modify this provision to apply only to those sites where the remedial design has not yet been completed. It is at the remedial design stage where a fresh look may make sense and will not significantly slow the pace of cleanups, as this is the most cost-effective stage to make changes to proposed remedies.

Lastly, while this title is basically implementable by State Waste Managers, we can not condone the preemption of State laws at Federal Superfund sites. By that I refer to the proposal to have Federal standards override State applicable standards where the State standards would affect remedy choices. Over 20 States have promulgated cleanup standards which in some cases may be more stringent than Federal law. These standards are oftentimes designed to address specific geographic and climatic conditions which exist within a State. These standards along with all other applicable State standards *promulgated* to regulate either the conduct or operation of the remedial action are needed to adequately protect human health and the environment and should be used to the extent they are more stringent than Federally established cleanup levels. State standards are applied consistently within the State and we see no justification for holding NPL sites to lower standards.

State Waste Managers, however, do support the concept of eliminating RARs—relevant and appropriate requirements in favor of a process where States will promulgate all relevant standards, criterion and requirements in a separate rulemaking for use in the remedy selection process. We believe this would streamline the remedy selection process and provide a greater level of certainty to responsible parties and to the public. This is an area that needs some reform, but not to the extent of *preempting State standards.*

TITLE II—LIABILITY

As State Waste Managers, our principal concern is ensuring the timely and effective cleanup of contaminated sites. The current liability scheme may not be entirely equitable to some responsible parties, but in the past it has provided a stable source of funding. Equity must also be extended to protect those Americans living near, and suffering the effects of, contaminated waste sites. Reforms are needed and we believe those outlined in title II of this bill will serve to address many of the statute's current inequities without disrupting the flow of cleanups. For example, in 1993 State Waste Managers developed and adapted a proposal advocating the carve out of municipal solid waste landfills from the Federal Superfund program. We do not view this as a "compromise solution", but rather a smart move from a practical implementation perspective. State Waste Managers have found these sites to be ill-suited for the current Federal Superfund liability program. Municipal Solid Waste Landfills, are for the most part, large sites which involve numerous responsible parties, served a societal function, and have a presumptive remedy associated with their remediation, i.e., capping. We support your decision to carve these sites out of the current Superfund liability program. We also concur with your decision to more clearly define and more actively utilize the liability relief tools of de micromis and de minimus settlements. We are uncertain as to the practical effects of providing retroactive liability discounts and we do have questions concerning how the process will actually work for determining pre- and post-1987 waste disposal. Ultimately, we caution that any final liability scheme which may be accepted by the Subcommittee must ensure sufficient funding to adequately cleanup sites to a level which is protective of human health and the environment and ensure the continuation of the States' ability to enforce their own laws. For example, we do not support the preemption of State law when granting indemnification to response action contractors.

TITLE III—BROWNFIELDS AND VOLUNTARY CLEANUPS

Current estimates indicate that there are tens of thousands of suspected contaminated sites in this country with only approximately 1,300 of those being listed on

the National Priorities List (NPL) and addressed by the U.S. EPA. State Agencies are responsible for remediating the majority of the remaining sites. We believe too little attention has been given by the Federal government to this vast number of non-NPL contaminated sites which, under current law, will never receive Superfund resources, and must be cleaned up by States, localities, and responsible parties. ASTSWMO appreciates the recognition of this void by the inclusion of title III in ROSA. This bill will encourage the redevelopment of brownfields sites and the further expansion of State voluntary cleanup programs by clearly acknowledging the primacy role of the State agencies at non-NPL sites (i.e., State sites). State Waste Managers have found that one of the biggest impediments to redeveloping brownfields is the inability of State Agencies to provide Federal releases of liability at the completion of a site. This title will provide the long-awaited finality and certainty to members of both the PRP and State communities. It is a significant movement towards reform, and we appreciate its inclusion in the ROSA discussion draft.

TITLE IV—NATURAL RESOURCE DAMAGES

This title is extremely important to State Waste Programs as the majority of States currently utilize the Federal CERCLA Natural Resource Damages provision rather than State law at non-NPL sites. In general, despite the new restrictions placed on trustees, we believe this title will enable trustees to continue to provide a level of primary restoration for the injuries to natural resources caused by these sites. We appreciate the recognition given by this title to the importance of the definition of "restoration", namely the clarification that both ecological and public use functions shall be restored. However, we are concerned about the treatment of damage claims as they relate to achieving a level of restoration that will account for the injuries suffered from the time of the discharge until restoration is achieved.

ASTSWMO has three primary recommendations for further improving the natural resource damages process. First, we believe the statute of limitations should be clarified to provide certainty to both the trustees and responsible parties. In order to balance the desires of the responsible parties to be through the natural resource damage assessments process in a timely manner and the trustees need to accumulate as much pertinent information as possible before filing a claim, we propose the following language: upon the signing of a ROD, a trustee will have one year to begin a natural resource damage assessment and upon completion of the assessment, the trustee will have one year to file a claim. We believe this may serve to meet the needs of both parties and to streamline a highly ambiguous area of the law. Second, in order for trustees to meet the goals of achieving cost-effective restoration methods, it becomes even more crucial for trustees to have access to the fund for assessing these sites. If the prohibition of using the fund for assessments is lifted, trustees will have the resources readily available to accomplish these assessments in a more timely manner, ultimately benefiting the responsible parties, the public and the environment. Lastly, the proposed definition of "cost-effective" and "cost-reasonable" need to be altered. While the concept employed to determine a cost-effective restoration alternative may be sound, i.e., the selection of the least costly of two similar restoration alternatives that achieve similar results, the definition fails to qualify that the restoration alternatives to be considered should only be those that are selected by the trustees in accordance with the criteria as established by the regulations. Similarly, with respect to the proposed definition for "cost-reasonable" the concept is sound, i.e. comparing costs of restoration to the value of the public service, however, this definition fails to take into account that restoration methods also need to compensate the public for interim losses. Therefore, the comparison of restoration costs to benefits can not always be based on an equal 1 to 1 value. We would be happy to work with your Subcommittee on further clarifying these definitions.

Finally, we acknowledge that this title of ROSA was extremely difficult to craft given the number of high profile cases associated with natural resource damages. We commend the Subcommittee on achieving a workable title and we look forward to finalizing a bill that will preserve the ability of trustees to restore our country's natural resources.

TITLE V—STATE ROLE

This is a well-crafted title that we believe can be implemented effectively. It could be improved in two areas. First, State Waste Managers would have preferred to see a title which would have allowed for the innovations that have occurred at the State level to be replicated at the Federal level through an authorization vehicle, i.e., the ability of the States to utilize and implement their owns laws and programs in lieu of those of the Federal government. Authorization is the only true method for trans-

ferring the streamlined approach which many States have adopted at the State level.

Second, ASTSWMO has a fundamental disagreement with the notion that the Federal Superfund program should be phased out over the next five years via the capping of the NPL. U.S. EPA and State Waste Managers project that there are potentially another 1700 NPL calibre sites yet to be remediated in this country. We think these sites warrant Federal resources and possibly Federal attention. At a minimum, if the Federal program is truly to be "phased out", we recommend that Congress find a mechanism to ensure that States are provided with adequate resources to sufficiently address these sites and to build their own program capabilities to finish the work started by the Federal government.

These two issues aside, State Waste Managers are very pleased with the majority of the components contained within this title. Primarily, the delegation process. This process shows that Congress has recognized that State capabilities have grown and that States should not be forced to undergo onerous approval processes. Self-certification with adequate accounting and auditing mechanisms is more than satisfactory and should provide an incentive for some States to take the lead at particular Superfund sites. Maximum flexibility is a necessity when dealing with fifty vastly different State programs. Some States will desire delegation of all sites within their borders, others may only apply for one or two sites, and developing States may seek delegation for only parts of the remediation process. The Subcommittee did well to recognize the unique needs of State programs and to provide a wide array of options for assuming the lead at Federal Superfund sites.

Another cost saving technique which has been added to this title which we support is the ability of States to receive reimbursements for conducting emergency and time-critical removals. State Waste Managers have long contended that they can perform these functions for less cost than EPA, essentially leveraging more "bang for the buck". Simply put, States are physically closer to the removals which occur within their own borders than either representatives from U.S. EPA regions or headquarters. This is a common sense change.

We are also pleased that ROSA streamlines the program by providing a fixed State cost share, namely 10% of remedial action costs and 10% of operation and maintenance costs. The current cost share system has served only to exacerbate the tension which exists between State Waste Agencies and the U.S. EPA. Under the status quo the financial incentives for EPA and the States are diametrically opposed when considering final remedies for a site (States desiring more capital intensive remedies and EPA seeking remedies with lower capital costs and higher operation and maintenance costs). State Waste Officials believe this is a fair and well-reasoned position.

TITLE VI—FEDERAL FACILITIES

Our overall comment concerning the Federal facilities section of ROSA, is the principle that Federal facilities should not be treated any differently than other Superfund sites. The Federal government should be held to the same standards as responsible parties and therefore, State applicable standards should not be waived at these sites. Our earlier comments concerning Title I of this testimony in regards to State standards and their applicability are equally relevant in legislating for Federal facility cleanups.

TITLE IX—REMEDIATION WASTE MANAGEMENT

As we testified during the July 20, 1995 hearing before this Committee, ASTSWMO is supportive of States having the option to waive RCRA permits during site remediation if there is another binding document between the overseeing agency and the responsible party; we believe that relief from land disposal restrictions where other treatment methods are adequately protective is appropriate, and we concur with the elimination of minimum technology requirements for *temporary* land-based units. These are common sense changes to the RCRA program which we feel are adequately reflected in Title IX of this bill.

CONCLUSION

In conclusion, ROSA is a good start to reforming the Superfund program. We have appreciated the open process exhibited by the workings of your Committee these past few months and we look forward to continuing our cooperative working relationship with you as you seek to further refine the Superfund program during reauthorization. We trust that as these reforms take shape, that State Waste Managers will be able to continue to find this an implementable bill and we will continue to

work with you to achieve that outcome. Thank you for your time and consideration and I will be happy to answer any questions you may have.

Mr. OXLEY. Thank you.

Mr. McIntosh.

STATEMENT OF W. CHARLES McINTOSH

Mr. MCINTOSH. Thank you Mr. Chairman and good morning. The Michigan Department of Environmental Quality is responsible for the air, water, groundwater, wetlands, waste management and environmental cleanup programs in our State. Our cleanup program is very large. We employ over 400 people and have spent nearly $1 billion doing the cleanups.

We have essentially been responsible for over 12,000 sites, 78 of which are on the NPL. We believe we do have one of the most innovative programs in the country in this area.

We've got extensive experience with our program and the Superfund program, and based on that experience we've just gone through a very significant overhaul of our own State cleanup statute, largely targeted at eliminating the unfairness associated with the strict joint and several liability in our State law that was modeled after the Superfund law. We did that to remove the impediments to revitalization posed by the cleanup program and to eliminate excess conservatism in our cleanup standards.

Based on our experience, it is clear that Superfund is broken and needs radical reform in order to accomplish the goals it was intended to accomplish. Superfund clearly has not achieved what we expected and it's become a gold mine for attorneys and a disaster for the myriad of parties that have fallen within its liability net. Far too little has been achieved to resolve the environmental problems it was intended to address.

The Michigan Department of Environmental Quality applauds the efforts of this committee to produce a workable law that corrects the major problems that are inherent with the existing Superfund law. The bill that we are commenting on today makes very significant strides in those areas. We are pleased that you have recognized the major role that States have in the cleanup of contaminated sites and have provided for the transition of the program to willing and capable States, and we're very proud to be part of this methodical process in working on this particular bill.

Again, we believe our current program and new law is a very innovative and effective way to approach correcting liability and remedy selection and although it's different than portions of the bill we're looking at today, we're very pleased that this bill has made substantial progress in removing the unfairness associated with the existing liability scheme and to reduce the high costs and overprotectiveness of the current Superfund cleanup standards. And that is the most important thing, the very Draconian liability standards that we've been saddled with.

We believe this bill provides a reasonable framework to finalize Superfund reauthorization. You've come a very long way and we continue to offer our assistance to work with the committee in whatever capacity you deem best.

In regards to remedy selection, we're very pleased to see the consideration of land use in the remedy selection process. This is one

of the keys in Michigan's program, one that's worked very well in producing cost-effective remedies.

We also support the use of hazardous substance easements to implement institutional controls, eliminating the preference for treating in remedy selection, emphasizing generic remedies which are appropriate in allowing early implementation of phased remedial actions.

I'd like to suggest that the terms "cost-effectiveness" and "cost-reasonableness" could be clarified. It's our belief that the law should precisely define the necessary level of health protection and that costs should only be used as a factor in the selection of the protective remedies. Cost should not be used to determine the level of protection but again, it should be part of the remedy selection factors.

We do recommend that the committee go to a single risk level in lieu of the risk range that it currently has and that's similar to Michigan's law. That's allowing us to have a significant reduction in the litigation involved in our cases.

Also, the generic cleanup standards criteria based on land use for both soil and groundwater for a broad array of contaminants. Use of the single risk level has eliminated the subjectivity in decision-making associated with the use of the risk range and the reduction, again, in litigation, as I've mentioned.

In our opinion, the improvements in the program administration associated with the use of a single risk level far exceed any cost savings that may occasionally result from the use of a risk range.

We also believe that zoning or lawful nonconforming uses should be used to establish allowable land use. Again, this has greatly speeded our process and added certainty to the process.

The current liability scheme of strict joint and several retroactive liability has been grossly unfair. This must be rectified. The existing liability scheme poses a significant impediment to redevelopment and serves to drive up transaction costs at the expense of getting cleanup completed.

This legislation eliminates much of the unfairness in the current system. It provides protection for innocent landowners, prospective purchasers, lenders, generators and transporters of municipal waste and the very small contributors.

Also, by ultimately removing liability for municipal landfills, an area highly prone to litigation, significant transaction costs have been eliminated.

Removing the barriers imposed by the existing Superfund law and facilitating the redevelopment of our brownfield areas is a critical issue for all of us to address. This was the primary motivation for many of the reforms we have just implemented in Michigan.

This particular title comes a long way in recognizing and addressing those barriers. It recognizes and fosters the variety of successful programs that have been developed, tailored to individual State needs across the country.

We're also pleased to see that the lender liability protections of this title, something that I understand that Congressman Upton was instrumental in, are here.

One of the areas we would like to see the bill go a little bit further in is the mechanism for releases from liability for purchasers

and developers of the contaminated property. We recommend that language specify that parties who resolve their liability under the State cleanup program also be released from Federal liability, and we'd be happy to work with the committee on those points.

Regarding the State role, currently Superfund law is the worst of all worlds of inefficient Government. Considerable duplication exists between Federal and State Government, resulting in inefficiencies and duplication and confusion for the public.

Title V provides an effective and efficient mechanism for addressing this issue by providing willing and capable States with the responsibility for managing the program while providing less sophisticated States a mechanism to build that capability. This title is a vast improvement over the current law.

We're also pleased with the provision of consistent cost share of 10 percent for States for remedial action and operation and maintenance. This has been very significant for us. This eliminates the tension of conflicting financial incentives between Federal and State agencies regarding capital intensive versus operation and maintenance intensive revenues.

We are concerned that a portion of this bill, and that is to end program funding after the year 2002. Although we in Michigan have worked aggressively to identify NPL sites, we do continue to discover new NPL-caliber sites on a yearly basis.

We do fully support, though, eliminating EPA's involvement in program administration and shifting this responsibility wholly to the States. We do believe again that the funding for the new NPL-caliber site cleanups, as well as long-term operation and maintenance at existing sites, should continue to be provided by Congress.

Just in conclusion, Michigan does support this bill. This bill has made tremendous strides. We want to see the bill move forward this year. We appreciate being at the table working on this bill. Again, it accomplishes many of the same goals we went after with our State law, that the money should go to remedial actions as opposed to litigation, reducing litigation. It removes the impediment to our commerce, allowing the redevelopment of brownfields, and injects a measure of fairness that has not been part of this.

[The prepared statement of W. Charles McIntosh follows:]

PREPARED STATEMENT OF W. CHARLES MCINTOSH, DEPUTY DIRECTOR, MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY

Good morning. I am Chad McIntosh, Deputy Director of the Michigan Department of Environmental Quality. The Department of Environmental Quality is responsible for Michigan's air, surface water, groundwater, wetlands, waste management and environmental cleanup programs.

Our state cleanup program is large. We employ over 400 people and have spent nearly a billion dollars doing cleanups. In addition, we have a 50-person staff which assists the U.S. Environmental Protection Agency (EPA) in implementing Superfund. We believe we have one of the most innovative and effective cleanup programs in the country. Our extensive experience with both our state program and the Superfund program gives us extensive, hands on, comparative experience regarding what works and what doesn't work with regard to cleanup programs. Based on that experience, we have just finished drastically overhauling our state cleanup statute in order to eliminate the unfairness associated with our old strict, joint and several liability scheme, to remove the impediments to revitalization posed by the cleanup program and to eliminate excess conservatism in our cleanup standards.

Based on our experience, it is clear to us that the Superfund program is broken and that it needs radical reform in order to accomplish the goals it was intended to accomplish. Superfund clearly has not achieved what we expected. Rather it has

been a gold mine for attorneys and a disaster for the myriad of parties which have fallen within its liability net. Far too little has been achieved relative to resolving the environmental problems it was intended to address.

I applaud the efforts of this committee to produce a workable law that corrects the major problems that are inherent with the existing Superfund law. The bill that we are commenting on today makes significant strides in those areas. We are particularly pleased that you have recognized the major role that the states are playing in the cleanup of contaminated sites and have provided for transition of the program to willing and capable states. Although Michigan has chosen different methods to address the liability and remedy selection problems which existed in the cleanup program, we are pleased to see the substantial progress shown in the bill to remove the unfairness associated with the existing liability scheme and to reduce the high cost and over protectiveness of the current Superfund cleanup standards.

We believe that this bill provides a reasonable framework to finalize Superfund reauthorization. As with any legislation, however, there are aspects of this bill we would like to see improved, and we are prepared to work with the committee in whatever capacity it deems appropriate to produce the best possible legislation.

At this time, I'd like to discuss a few aspects of the proposed bill in more detail and then would be happy to answer any questions the committee may have.

TITLE I—REMEDY SELECTION AND COMMUNITY PARTICIPATION

We support the bulk of this title. In particular, we are pleased to see consideration of land use in the remedy selection process. This is a key aspect of Michigan's program, and one that has worked well in producing cost-effective remedies. We also support the use of hazardous substance easements to implement institutional controls, eliminating the preference for treatment in remedy selection, emphasizing generic remedies where appropriate and allowing the early implementation of phased remedial actions.

In the way of improvements, we believe the terms "cost-effective" and "cost-reasonable" should be clarified. It is our belief that the law should precisely define the necessary level of protectiveness and that cost should only be used to select among protective remedies. Cost should not be used to determine what is protective.

In addition, we recommend the committee adopt a single risk level in lieu of a risk range. Michigan has established a 1 in 100,000 additional cancer risk as its acceptable level of protectiveness and from that has developed generic cleanup criteria based on land use for both soil and groundwater for a broad array of contaminants. Use of a single risk level has eliminated the subjectivity in decision making that is associated with the use of a risk range and the contentiousness that goes along with that subjectivity and has greatly speeded up decision making. In our opinion, the improvements in program administration associated with use of a single risk level far exceed any cost savings that may occasionally result through use of a risk range.

We also believe that zoning or lawful nonconforming uses should be used to establish allowable land use. Again this approach adds precision, thereby speeding decision making and eliminates unnecessary controversy and potential litigation.

If the committee is effective in crafting the bill so that it maximizes precision and minimizes subjectivity, we believe it is then possible to retain the bar on pre-enforcement legal review of the ROD until the ROD is implemented, since there will be much less opportunity for disagreement. This would be an environmental plus since the implementation of remedies critical to protecting health and the environment would not be delayed.

The bill should also clarify that if a ROD is reopened pursuant to the new provisions of this title, that all costs lawfully incurred to date pursuant to the old statute, need to be considered in the cost effectiveness determination and should remain cost recoverable.

TITLE II—LIABILITY

The current liability scheme of strict, joint and several retroactive liability has been grossly unfair. This must be rectified in the reauthorization of Superfund. The existing liability scheme poses a significant impediment to redevelopment and serves to drive up transaction costs at the expense of getting cleanups completed. This legislation eliminates much of the unfairness in the current system. It provides protection for innocent landowners, prospective purchasers, lenders, generators and transporters of municipal waste and the very small contributors. Also, by ultimately removing liability for municipal landfills, an area highly prone to litigation and significant transaction costs has been eliminated.

TITLE III—BROWNFIELDS AND VOLUNTARY CLEANUPS

Removing the barriers imposed by the existing Superfund law and facilitating the redevelopment of our brownfield areas is a critical issue for us all to address. This was the primary motivation for many of the reforms we have just implemented in Michigan. This title comes a long way in recognizing and addressing those barriers. It recognizes and fosters the variety of successful programs that have been developed, tailored to individual state needs across the country. We are also pleased to see the lender liability protections of this title, something that we in Michigan have even expanded upon.

One area which we would like to see more effectively addressed is the mechanism for releases from liability for purchasers and developers of contaminated property. We recommend that language specify that parties who have resolved their liability under the state cleanup program also be released from Federal liability. We would be happy to work with the committee in developing this language to ensure that it addresses the issues presented by the various state programs.

TITLE V—STATE ROLE

Currently under Superfund, law we have the worst of all worlds in inefficient government. Considerable duplication exists between the Federal and state government resulting in inefficiencies, duplication and confusion for the public. This title provides an effective and efficient mechanism for addressing this issue by providing willing and capable states with responsibility or managing the program while providing less sophisticated states with a mechanism to build their capability. This title, is a vast improvement over the current law. We are also very pleased with the provision for a consistent cost share of 10% for states for remedial action and operation and maintenance. This eliminates the tension of conflicting financial incentives between the Federal and state agencies regarding capital intensive versus operation and maintenance intensive remedies.

Our only concern with this portion of the bill is over the proposal to end program funding after the year 2002. Although we think that we have done an excellent job in identifying our serious sites of contamination in Michigan, we continue to discover new NPL-caliber sites on a yearly basis. Although we fully support eliminating EPA's involvement in program administration and shifting this responsibility to the states, we do believe, however, that funding for new NPL-caliber site cleanups as well as long-term operation and maintenance at existing sites should continue to be provided by Congress. To do otherwise would shift a major responsibility to the states without providing any revenue source, and that would present a serious problem for most states.

In conclusion, we support a great many of the actions you have proposed to reform Superfund. As with any legislation, there are some aspects that we would like to see improved, and we would be happy to work with you to do so. I very much appreciate having this opportunity to testify. Please do not hesitate to call on us if we can assist the committee in any way as it proceeds in this important process. At this time, I would like to answer any questions you may have.

Mr. OXLEY. Thank you, Mr. McIntosh, and thank you both for your testimony.

Let me say, before I start, both of your States have really had leadership roles in dealing with this issue at the State level and a lot of the ideas that have been coming out of States like yours have been incorporated in our legislation. If States are truly the laboratories of Government, we've benefitted greatly by your example.

Let me ask both of you, we heard in the opening statements from some of the members references to hot spots. Last year's bill would have maintained the current statute's preference for permanent remedies and treatment at so-called hot spots.

Would you want this sort of preference to apply at certain sites, even if you feel there are more effective ways of dealing with the contamination? Or would you prefer the flexibility that we think our bill entails? Mr. McIntosh?

Mr. MCINTOSH. We do not support the preference for permanence of treatment. In Michigan, first of all, we do enjoy the flexibility

in our State law to be able to go to the hot spots, to do interim responses, to remove the worst part of the contamination.

We also, again, believe that the goal, again, is to protect the public health, so what we want to do at each one of these sites is take away the avenue of exposure to these chemicals, and treatment is just one way to do that. Containment is another way, in conjunction with institutional controls. So we don't support that.

Mr. OXLEY. Mr. Colman?

Mr. COLMAN. I agree with that. I think rigid hierarchies really don't work well in this kind of a program and we need flexibility. Sometimes a permanent solution is a better and most cost effective one; sometimes it's not.

I think especially in light of brownfields, where we're trying to get sites redeveloped, there are often ways to cap and build over with certain kinds of contaminants that don't volatilize and build over sites, and redevelopment can occur with complete safety for the public health, that that can be a perfectly fine solution.

So we think that with flexibility, you can get the best solution for the particular site and the particular re-use that that site's going to be used for.

Mr. OXLEY. Our good friend and colleague, Mr. Markey, commented that perhaps the remedy selection under this bill, would not adequately protect human health and the environment. Do you see anything in this bill that would lead you to believe that you could select a remedy that did not adequately protect human health and the environment?

Mr. COLMAN. Frankly, yes. I think that there is the issue which we've brought up in our testimony of the State-applicable standards. I'm not talking about appropriate and whatever the other—ARAR's—but applicable standards which have been promulgated primarily or specifically for cleanups. I think sometimes, particularly with respect to groundwater, there can be situations, for example, in Massachusetts, where we're dividing our groundwater into those areas which we think absolutely need to be protected for future drinking water and areas that do not need to be protected because they're already developed or contaminated.

And under this bill, if there were a surplus site in the area we've set aside through a State regulatory process for future drinking water, that that could be a problem.

Mr. OXLEY. Let me first cite the language and ask Mr. McIntosh to respond first.

Mr. MCINTOSH. Sure. I only made one comment in that area and that was that we would like to see some clarifying language. The bill does not do anything that would compromise the protection of public health. You have the public health standard in the bill.

We would like to see that the language regarding cost effectiveness go to remediation or selection, but we do not believe that it goes to lessening public health protection at all.

Mr. OXLEY. I just would simply cite, in the bill, on page 7, lines 13 through 17, the bill says, "Remedies selected shall be those necessary to protect human health and the environment from realistic and significant risks through cost effective and cost reasonable means."

And then, if I could quote from the ASTSWMO statement, it says, "ROSA will adequately meet the programmatic needs of the implementers and provide for the continued protection of human health and the environment."

So obviously, that's our goal. We may be able to work with you to make certain that that language is clearer but clearly, I think we all share that same goal.

Let me ask Mr. Colman, it's my understanding that the staff has relayed to ASTSWMO my commitment to the States to the principle of cost neutrality for the States. That is, this bill will not increase the cost for States.

You've been given that commitment; is that correct?

Mr. COLMAN. Yes.

Mr. OXLEY. And obviously the bill contains provisions to get us to that goal. We share that same goal. So I think this is, again, a matter perhaps of semantics but clearly the goals are identical that we're trying to accomplish.

Mr. COLMAN. And we appreciate that very much.

Mr. OXLEY. Last year's proposal preempts State-applicable standards in a number of ways. It does not allow State standards to operate if they are less stringent than Federal standards. It preempts applicable State and Federal requirements respecting the return, placement or disposal of contaminated media residuals into the same medium in or very near existing areas of contamination on site.

It authorizes the President to exempt NPL cleanups from applicable State and Federal requirements through 6 waiver provisions and it appears to preempt inconsistent State standards in the context of national generic remedies.

Do you both support these preemptions of State standards in last year's bill, which has been reintroduced this year in H.R. 228?

Mr. COLMAN. I don't think we supported those last year and we don't support them—we wouldn't support that concept this year, either.

Mr. OXLEY. Thank you. Mr. McIntosh?

Mr. MCINTOSH. I will say this, that we prefer that the preemption not be in the bill, but when you go back to the basic goal of public health protection, we feel that the scheme in this bill does adequately provide for the public health protection. We have over 12,000 sites in Michigan and only 78 are NPL. We're comfortable with the bill as is.

Mr. OXLEY. Mr. Colman, last year's proposal, as you know, would have required a 15 percent State cost share, both for the remedial action and for operation and maintenance costs.

ASTSWMO's position has been in opposition to that level of State cost share. What is your current position about the 10 percent State cost share in this bill? Isn't that what ASTSWMO had supported previously?

Mr. COLMAN. Yes.

Mr. OXLEY. Your testimony says that overall, your organization is very pleased with the majority of the components contained within the State role, primarily the delegation process. Could you expand a little bit on why you approve of the way this process

would work? It's my understanding that at the suggestion of the States, this process was intended to be very flexible.

Mr. COLMAN. Yes, and that's one of the reasons, the primary reason we like it. I think it recognizes the fact that many States have done a lot over the last several years to improve and expand and build their programs, and this allows, if it's administered the way I think it was intended to be administered, a fairly straightforward delegation process without a lot of red tape and bureaucratic hassles and allows the States to do what it is, I think overall, we can do as well and better than EPA has done.

Mr. OXLEY. In your statement you talked about your concern about applying Federal standards to the cleanup process. It's my understanding that what I attempt to do, obviously, is to provide enough flexibility to States but still provide some floor for cleanups.

And since the Federal Government essentially is providing the bulk of the funding, isn't that a fair trade?

Mr. COLMAN. That's a good question. I think that as a general issue it might be, but I do think again that States have done a lot of work to deal with specific issues in their own States to protect the public health and the environment, and I don't think that the Federal Government should preempt those standards.

Mr. OXLEY. Well, don't you think it's reasonable, though, that we, as policymakers at the Federal level dealing with billions of dollars in tax revenue, have an obligation to at least set basic standards, the floor that the States should meet in the cleanup process, since it's essentially our—I hate to speak to it as our money, but essentially it's Federal dollars that we're talking about.

Mr. COLMAN. Well, if it were just a floor, that would be fine, but I think it's both a floor and a ceiling, the way it's set. And I think that we would agree with the floor, because we think all States ought to meet a certain minimum standard, but we think that States that have gone through a public, open process, to go a little bit beyond that in their States, should not be penalized for having done so.

I think also, as we all know, there are many, many more State sites that are not part of the NPL than there are NPL sites, and I just think it sets up a real confusion with respect to the public where you have an area with maybe 10 or 15 State sites and one CERCLA site, one NPL site, to have the NPL site meet a different set of standards in the same community than all the State sites do. I think that sets up a problem that's hard to explain, frankly, to the public as to how could that happen.

Mr. OXLEY. You indicate in your statement that State standards are sometimes designed to address specific geographic and climactic conditions within a State, and obviously that's a good point. Site-specific risk management is even better tailored. If State standards are better tailored to specific geography, why do you only argue for State standards when they are more stringent than the Federal approach?

In fact, shouldn't we promote the general principle that State standards should operate in lieu of the Federal standard, regardless of whether they are more or less stringent?

Mr. COLMAN. I think that would be something worth exploring, to see what the implications of that would be and how that would

work. I understand the logic of your question and I'd have to have some time to think about it and talk to my colleagues, but it's something worth talking about.

Mr. OXLEY. Mr. McIntosh, do you have any comments in that regard?

Mr. MCINTOSH. Again, we're comfortable with the bill setting Federal standards, and we believe, with the transferring of the programs over to the State, we could implement those standards in a much more cost effective manner than the EPA.

Ideally, we believe our standards are effective and our ability to select our own remedial options are even more flexible, but we're comfortable with this bill. It's come a long way and it accomplishes the goals we're after.

Mr. OXLEY. Thank you. I've expired my time and I'm going to turn to the gentleman from New York, Mr. Manton.

Mr. MANTON. I'll pass, Mr. Chairman.

Mr. OXLEY. The gentleman from Massachusetts.

Mr. MARKEY. Thank you, Mr. Chairman.

Mr. Colman, if I may, I'm somewhat puzzled by your testimony. On page 2 of your statement you begin by saying that "Even though many of the approaches advocated in ROSA may not be our preferred choices for implementing the program, we do believe that ROSA will adequately meet the programmatic needs of the implementors and provide for the continued protection of human health and the environment.''

You then proceed to deliver a blistering, scalding indictment of the bill. I'd like to walk through some of the very serious criticisms you've raised in the bill. Since I have only 5 minutes, I have to ask you to be very brief in your answers, if that's okay. Please try to give a yes or no answer where possible.

First, as I read your testimony, one of the concerns is that many provisions in this bill will not lead to more expeditious and streamlined cleanups. Is that correct?

Mr. COLMAN. Yes, we have some concerns along those lines.

Mr. MARKEY. Isn't it true that the bill requires, in your words, "a time-intensive cost-benefit analysis at every site as an overlay to the 5 remedy selection factors, which have already included reasonableness of cost"?

Mr. COLMAN. To be more precise, I think we said that it could increase the time delays. A lot depends upon how that's implemented, but we are concerned about that.

Mr. MARKEY. Thank you. Historically, your organization of State program managers has strongly opposed legislation which requires either Federal or State Superfund managers to conduct cost-benefit analyses at every site; isn't that correct?

Mr. COLMAN. Yes.

Mr. MARKEY. Hasn't your organization warned that these additional cost-benefit analyses would be a drain on scarce State resources and would tip the scale in favor of cheaper, less protective remedies and either directly or indirectly preempt State standards?

Mr. COLMAN. We express that concern again here in our testimony, as you've pointed out.

Mr. MARKEY. Wouldn't you agree that remedy selection would proceed faster if we followed your organization's previous rec-

ommendation that we adopt a process based on national standards where remedial cost is measured using a disproportionate cost formula?

Mr. COLMAN. Yes, we said that.

Mr. MARKEY. Thank you. Let me turn now to a second area of concern raised by your testimony; opening up cleanup decisions and expanding judicial review.

Isn't it true that the bill changes current law to allow final cleanup decisions, known to the Superfund cognoscenti as records of decisions or ROD's, to be immediately litigated in court, a step which you say could extend the cleanup time associated with these sites by many years?

Mr. COLMAN. Yes.

Mr. MARKEY. Now, I understand that there are over 700 Superfund sites where all final cleanup decisions have been reached, including 12 in Massachusetts, and another 250 sites, including 8 in Massachusetts, where some cleanup decisions have been reached; for example, soil—but others are still pending—for example, groundwater.

Won't this bill require the EPA or a delegated State to go through the whole process again and subject the Agency's decisions to immediate judicial review for each of these sites?

Mr. COLMAN. It could, yes.

Mr. MARKEY. How is this requirement going to affect the 20 sites in Massachusetts, where all of the ROD's have been signed or where the ROD's have been signed but others haven't? Won't this likely delay final action on cleaning them up?

Mr. COLMAN. Yes.

Mr. MARKEY. Now, your testimony says Federal and State resources are dwindling and you note State Governments simply do not have the resources to review sites where the remedies have already been chosen. An October 11 Boston Globe editorial urging the State legislature to approve your budget noted that your budget has moved through the legislative process. You've had to scale back or delay 16 cleanup projects. Is that true?

Mr. COLMAN. It was our capital budget, not our operating budget, but yes.

Mr. MARKEY. The Globe editorial also notes that scaling these projects back adds some expense and then adding them back adds even further to the cost. Is that true?

Mr. COLMAN. Yes.

Mr. MARKEY. If you are required to go through more process, more studies, more lawyers, isn't that just going to mean fewer resources will be devoted to actual cleanups?

Mr. COLMAN. Yes.

Mr. MARKEY. Now, I understand that Massachusetts has a program which licenses outside site professionals to oversee the majority of cleanups, which helps you save costs, expedite cleanups, and direct scarce staff resources to the most contaminated sites. Won't this bill have an adverse impact on that Massachusetts program?

Mr. COLMAN. We have concerns about a couple of the provisions that could adversely affect that program, yes.

Mr. MARKEY. Are you aware of any other States with similar programs that might also be adversely affected? Are there other States?

Mr. COLMAN. I believe there are.

Mr. MARKEY. Let me now turn to a third area of concern: capping the NPL and phasing out the Superfund program. On page 10 of your prepared testimony you say that "State program managers have a fundamental disagreement with the notion that the Federal Superfund program should be phased out over the next 5 years by way of capping the NPL."

You say that the EPA and State waste managers project that there are potentially another 1,700 NPL-caliber sites yet to be remediated in the country. If we cap the NPL's, who is going to pay for those 1,700 additional sites? The States? And where is the money going to come from? Do you have enough money in your budget to pick up the gap? Will it be the States who will be responsible?

Mr. OXLEY. The gentleman's time has expired. The gentleman may respond.

Mr. COLMAN. It will be the States and the potentially responsible parties, a combination. But definitely money will be a problem.

Mr. MARKEY. But you would need Federal dollars.

Mr. COLMAN. Yes.

Mr. MARKEY. Thank you, Mr. Chairman.

Mr. OXLEY. The gentleman's time has expired.

Let me ask the gentleman, Mr. Colman, it is also true that we've maintained in our bill section 107, giving your State and other States the ability to deal with the retroactive liability issue; is that correct?

Mr. COLMAN. I'm not sure I understand the question.

Mr. OXLEY. In essence, section 107, under the current statute, is retained in the legislation.

Mr. COLMAN. Yes.

Mr. OXLEY. And you support that, retaining section 107?

Mr. COLMAN. Yes.

Mr. OXLEY. Let me ask you, your written testimony states opposition to judicial review of the record of decision, even where millions of dollars are at stake.

Since we have chosen a liability model, I wonder when PRP's get their day in court. Let me ask both of you, if I may, about accountability.

First, and let me start with Mr. Colman, do you believe that PRP's should have their day in court?

Mr. COLMAN. Yes.

Mr. OXLEY. Do you believe there is a true emergency after the 3 or more years it takes to sign a ROD?

Mr. COLMAN. Sometimes there may be but I don't think that the emergency is the only situation where you would want to have swift cleanup. I think in the brownfield situation, for example, there may be economic or other reasons why you would want to get that cleanup done sooner rather than later.

Mr. OXLEY. Are you aware of laws where people are forced to spend millions of dollars with no recourse whatsoever when they

are forced to spend the money? And are you aware of any analogous situations to CERCLA's preenforcement bar?

Mr. COLMAN. I'm not aware of them, no.

Mr. OXLEY. Do you believe that there are people who would hazard the treble damages provisions of CERCLA against an agency, even if they believed they were right on the merits?

Mr. COLMAN. I think there are probably companies who have done that, yes.

Mr. OXLEY. Not very many probably.

Mr. COLMAN. Probably not, but they're there.

Mr. OXLEY. What good will court review do after the wrong long-term remedy is implemented?

Mr. COLMAN. Well, is it the question of the wrong long-term remedy, details of the remedy, or suits over who's going to end up paying for it? I don't think that's real clear. I think to make the assumption that EPA or State Government would always make the wrong decision and that's what's going to be litigated and completely turned around is not a good assumption, frankly.

Mr. OXLEY. You state that judicial review upon signing of the ROD rather than upon completion of the remedy could extend cleanups. That seems to me a somewhat deceptive statement. Isn't it true that ROSA itself does not provide for a stay of the cleanup pending judicial review and only principles of common law would provide such a stay?

Mr. COLMAN. I'd have to consult on that. I'm not sure about that.

Mr. OXLEY. Mr. McIntosh, are you familiar with that?

Mr. MCINTOSH. You'd have to repeat that last question, please.

Mr. OXLEY. Isn't it true that ROSA itself does not provide for a stay of the cleanup pending judicial review, and only principles of common law would provide such a stay?

Mr. MCINTOSH. Yes, I would agree with that statement. If I can make one comment on reopening the ROD, I think in all practicality, if ROSA is passed, Michigan would be happy to work with people and reopen these without a judicial review, to implement a more fair and reasonable cleanup scenario. Our only concern is that we'd still be able to recover costs incurred up to that point.

Mr. COLMAN. If I may, it's not clear to me that it's clearly in the statute that the challenge, judicial challenge would not stay the cleanup.

I think in terms of reopening ROD's, just to respond to what Mr. McIntosh said, we have some ROD's that were signed 10 and 12 years ago in Massachusetts and now to dredge them up again may not be real fair to the people who live around those sites and who want to see quick cleanup. It seems to me we're going in the opposite direction there.

Mr. OXLEY. Isn't it true, though, that a preliminary injunction requires meeting a stringent 4-part test which includes substantial probability of prevailing on the merits and irreparable harm to the plaintiff which exceeds the harm to society? That's a pretty high standard, is it not?

Mr. COLMAN. I'm not an attorney, sir, so I'm not sure I can answer you with detail.

Mr. OXLEY. Mr. McIntosh, do you have a comment?

Mr. MCINTOSH. It does, and that is a high standard.

Mr. OXLEY. Do you believe, Mr. Colman, that the courts should not have such authority for Superfund and, if so, why do you believe courts would abuse the authority given them?

Mr. COLMAN. Well, I would have to go back and look at the language again. I'm acting on the presumption, which you seem to be saying may not be correct, that judicial review would stay the cleanup. It's not clear to me that while it's in court who's paying for the cleanup.

So it seems to me in many situations, as a practical matter, the cleanup could certainly be postponed pending determination of exactly what all the details of the remedy are, et cetera.

Mr. OXLEY. Under our bill, of course, the rules remain intact pending review so that it encompasses the problem that you're pointing out and says we continue on with the process during the review, so that there's no gap or no stoppage of what is occurring. That's basically what we try to do in the bill; provide for judicial review but, at the same time, maintain the existing rules until they're overturned, until and unless they're overturned.

Mr. COLMAN. I'm a little confused now. Are we talking about reopening ROD's or judicial review when a ROD is signed?

Mr. OXLEY. Judicial review when the ROD is signed.

Mr. COLMAN. Well, I thought the way that would work is EPA issues a ROD and the PRP or other person challenges it. It's not clear to me how the work could go forward if that ROD is under attack in the courts and the court is, through its procedures, reviewing that ROD.

The PRP's certainly aren't going to go forward with it because they're challenging it. EPA, it seems to me, may not want to go forward with it, pending outcome of it because if EPA wins, maybe the PRP's would do it and save the fund money.

So I guess I'm a little confused about how it would actually play out.

Mr. OXLEY. Well, I think our goals are probably the same. Our idea is to try to get a situation where a stay would only be granted with the preliminary injunction, which is a relatively high standard.

Mr. COLMAN. That would make a difference.

Mr. OXLEY. Thank you. The gentleman from Michigan.

Mr. STUPAK. Thank you, Mr. Chairman.

Let me ask my first question along these lines. Mr. Chairman, you indicated in a question to Mr. Colman that there was a commitment to the States that their costs won't go up. I guess my question is, and I don't know if I should direct it to Mr. Colman or to you, what is that commitment; what are the guarantees found in this bill that their costs won't go up?

I know there's this 10 percent floor but there was a colloquy between you and Mr. Colman, and I don't see where those commitments or guarantees in the bill that the cost to the States won't go up. On what basis do we make that statement?

Mr. OXLEY. If the gentleman would yield——

Mr. STUPAK. Sure.

Mr. OXLEY. The idea is based on the cost share, and that as the amount of money coming from the fund would be spent, we would essentially hold the States harmless for any increases in that re-

gard. That's a relatively standard operating procedure when this kind of arrangement is made.

Mr. STUPAK. Won't it go up by cutting off the NPL? Won't the costs go up and won't there be less money available? They're telling us their resources are scarce and dwindling, as Mr. Markey pointed out, so does that mean then as more dropped off, the Federal Government has to pick it up?

Mr. OXLEY. Well, the liability scheme remains intact for the situation you mentioned, so that again we're talking about the cost-sharing, and I think we've addressed it in the legislation. We may want to clarify that but clearly our intent is to hold the States harmless for any increases in their cost.

The last thing we want to do, I would say to my friend from Michigan, is to load up extra costs on the States, indeed an unfunded mandate. That's not our goal and clearly not our intent.

Mr. STUPAK. Right. I know what the goal and the intent is but I don't see it spelled out in the bill as to how that would be achieved, and that's why when the discussion went back and forth I wanted to see if we could get it clarified on the record, because I want to make sure that does not happen.

Mr. OXLEY. If the gentleman would yield, just on the cost-sharing with regard to the retroactive liability, and we think we've got it fairly well nailed down in that regard.

Mr. STUPAK. Okay. Let me pick up a little bit on these ROD decisions here. Judicial review would be available upon issuance of a ROD, which is different than what it is right now. Therefore, Mr. Colman, if you're going to have judicial review every time a ROD is issued, under the proposed legislation, that would account for a greater delay, then, in the actual cleanup?

Mr. COLMAN. As you've described it, I believe it would.

Mr. STUPAK. And let me clarify one more point. Like Massachusetts, Michigan has a number of cases where the ROD has been signed but where construction has not yet begun. Therefore the EPA, the applicable State or the PRP can request a review and, I take it underneath the bill, it's a judicial review of that ROD. If the remedy reform changes would result in a proposed lower cost remedy.

My concern there is if it's taken 3 years, as the testimony was previously, to even get a ROD and now, before you even begin cleanup, as long as construction has not begun underneath the proposed legislation, you can go in for judicial review—again, delay any further increased litigation costs?

Mr. COLMAN. That's certainly possible. I think perhaps in my discussions with the chairman here whether it's clearly in the bill or not, I'm not sure, but if there were a standard that had to be met which, if you didn't meet that standard you'd have to go forward with the cleanup anyway and the court was pursuing it simultaneously, that might be some way to deal with some of this issue. I'm not sure.

Mr. STUPAK. Well, my concern, as expressed by my questions, is that under title I, I think there's going to be further delay in cleanup and further legal costs underneath the proposed bill, especially if you can go back and reopen a ROD that's already been signed.

Mr. McIntosh, can you amplify on why you indicate that terminating the NPL and the Federal funding for new NPL-caliber sites, as well as long-term operation and maintenance of existing sites, would be a serious problem for most States? I noticed that in your testimony.

Mr. MCINTOSH. Well, Michigan's been very aggressive in trying to find these sites within our State and probably rank up right behind New Jersey in that aggressiveness. Even though we've worked really hard on this, we still continue to occasionally find new NPL sites and that's a concern we have on that.

What was the other part of your question, please?

Mr. STUPAK. Well, not only in the funding. What about the funding, though, for the new NPL sites? I mean, underneath this proposed law, after you get the 1,700 NPL sites, if the NPL is terminated after only another 125 additional sites and you get your 125 but, as you indicated, you're still finding more sites all the time because you're aggressively pursuing this, will that not actually increase your costs then and you will not be able to look to the Federal Government to help fund not only a cleanup but also the operation and maintenance of the existing sites.

Mr. MCINTOSH. It would increase costs for finding in regard to the new sites. However, this bill would significantly reduce costs because now we would only be contributing 10 percent to the operation and maintenance, where prior to that the EPA stuck us with much more than that. So overall, it has a reduction in cost effect.

Mr. STUPAK. But if I may, you're opposed to the cut-off of the NPL, right?

Mr. MCINTOSH. That's correct.

Mr. STUPAK. Thank you, Mr. Chairman.

Mr. OXLEY. I thank the gentleman. The gentlelady from Arkansas. The gentlelady is recognized for 5 minutes.

Mrs. LINCOLN. Thank you, Mr. Chairman.

Mr. Colman, my understanding under the draft bill that we have is that the U.S. Government would only be able to address resources owned or held in trust by the United States for the natural resource damages section. And I guess my question, in terms of limited recovery, could you say definitely that the proposal would not jeopardize the U.S.'s ability to address harm to resources that it presently manages or controls?

Such areas as coastal areas are a concern, but for me, when you talk about migratory birds, the marine fisheries resources and their supporting habitats, I am extremely concerned. I am in the Mississippi flyway and duck hunting is quite an important industry for us. But I'd be interested to have your response there.

Mr. COLMAN. My understanding is that the issue of what were owned and held in trust hasn't been changed from the current legislation. So it's my understanding that those things would still be covered, presuming they're committed uses.

Mrs. LINCOLN. But they're managed by the Government, not necessarily owned or held in trust.

Mr. COLMAN. I think that most of those areas are managed either by the Federal Government or by the State Government. I have to say I haven't heard of that being an issue by the way the issue of things held in trust by the Federal or State trustees—has

been an issue in getting at those kinds of things, but we can look into that further.

Mrs. LINCOLN. Well, if it's specifically mentioned as only owned or held in trust, as opposed to managed and controlled, I'd certainly be interested, if you've got some response to that, if you could submit it to us.

Mr. COLMAN. Okay.

Mrs. LINCOLN. The other question would be in terms basically of the draft's $50 million cap for the damages caused by cumulative releases from facilities in an area of contamination, as well as the entire contiguous area of contamination.

Do you have any idea of what the percentages of the sites that are currently out there would fall outside that cap?

Mr. COLMAN. Very well. It's a few.

Mrs. LINCOLN. But you don't have any idea of——

Mr. COLMAN. I don't have the exact number but I know there's one in Massachusetts which would have been higher, which was higher than that. The settlement is already done. But in talking to my colleagues around the country I've heard of only a handful or less that would be more than that at facilities. And there also, I believe, is a provision in here, there's money from the fund. Up to $100 million can be used for making up those claims that would be over $50 million.

So that does go some way, I have to say, to making up for that provision. But I think I can say with some certainty that the vast majority of natural resource damage claims will be less than $50 million.

Mrs. LINCOLN. Well, there's a couple of examples that I had and I guess my question really goes to the point of whether you definitively say that the draft bill would not jeopardize the full restoration of those specific sites, for instance, Bunker Hill in Idaho and I think Clark Fork in Montana, Hudson River Watershed in New York?

Mr. COLMAN. On the site-specific cases, I'd have to get back to you. We can do that.

Mrs. LINCOLN. Okay. Thank you, Mr. Chairman.

Mr. OXLEY. The gentlelady's time has expired.

Let me, while we have just a brief time before the next vote, I'd like to just complete this panel, if I could, with a couple of questions.

First of all, I'd like to ask both of you what you think of the RCRA title in our bill. Do you agree that it will streamline and expedite the process?

Mr. COLMAN. I wholeheartedly endorse title IX, yes.

Mr. OXLEY. Mr. McIntosh?

Mr. MCINTOSH. Also.

Mr. OXLEY. Some States have raised concerns that if the EPA could withdraw delegated authorities from the States on a site-by-site basis, that such a withdrawal scheme would encourage EPA to be constantly looking over the shoulders of the States, second-guessing their decisions and threatening to withdraw their delegation if the State did not exercise the authority as EPA would require.

Do you think that allowing EPA to withdraw only the entire authority delegated to the State would minimize interference and threats of withdrawal from the EPA?

Mr. COLMAN. Yes, we agree with that. We agree with that approach. If they can withdraw on a site by site basis, we fear that there will be pressure for micro-management.

Mr. OXLEY. Do you agree, Mr. McIntosh?

Mr. MCINTOSH. Very much, and that's where micro-management is at its worst, when they do have that ability to second-guess us on a site by site basis.

Mr. OXLEY. I think both of you have commented in favor of a liability structure that removes liability from municipal landfills and de minimis parties, and both of those concepts obviously are in the bill. Is your support for this based both upon the fact that these ideas will reduce transaction costs? And can you give further detail about what you believe is the effect of these proposals?

Mr. COLMAN. Well, I think on the municipal landfill side I think there's definitely a transaction cost issue; plus I think there are some equity issues there in terms of the amount of nonhazardous waste which may be in those—household wastes which may be in those landfills, which may tip the equities in some cases against having large numbers of PRP's have to do that.

And your second was what? The de minimis?

Mr. OXLEY. Yes.

Mr. COLMAN. We think that a lot of transaction time gets taken up with relatively small issues and small amounts of waste, and so we think that that definitely would streamline it. And often in settlements, when we do settlements, we try and get the small ones out of the way as quickly as possible because it's not in their interest or our interest to spend a lot of time chasing just a few bucks.

Mr. OXLEY. Mr. McIntosh?

Mr. MCINTOSH. I agree with that. I saw some literature where the estimate was that it would eliminate 25 percent of the transaction costs associated with Superfund. I think it's going to be more. The morass of hauling of those law-abiding small businesses and citizens into a Superfund liability case has just been unconscionable.

So you could say I also think it's very much a fairness issue. People that have been complying with the laws all their life getting pulled into something like that is ridiculous.

Mr. OXLEY. We thank both of you for testifying today and appreciate your continued interest in this issue.

The subcommittee will stand in recess for 10 minutes.

[Brief recess.]

Mr. OXLEY. If our panel number 3 would assemble, the Chair apologizes for the delay. Because of the number of votes on the floor it's been extended a bit.

Is Mr. MacMillan in the room?

Let me start by introducing the panel. Our first panelist is Mr. Carl Mattia, vice president of environment, health and safety management systems for BF Goodrich Company, representing the National Association of Manufacturers; Dr. Larry Bone from the Dow Chemical Company; Mr. Michael Parr, manager of the remediation

program from DuPont; and Ms. Velma Smith, Friends of the Earth here in Washington.

We appreciate your being here and we'll begin with Mr. Mattia.

STATEMENTS OF CARL A. MATTIA, VICE PRESIDENT, ENVIRONMENT, HEALTH AND SAFETY MANAGEMENT SYSTEMS, BF GOODRICH COMPANY, ON BEHALF OF NATIONAL ASSOCIATION OF MANUFACTURERS; LARRY BONE, MANAGER, ENVIRONMENTAL REMEDIATION, DOW CHEMICAL CO., ON BEHALF OF NATIONAL ENVIRONMENTAL DEVELOPMENT ASSOCIATION'S RCRA PROJECT AND AMERICAN IRON AND STEEL INSTITUTE; MICHAEL S. PARR, REMEDIATION PROGRAM MANAGER, DUPONT; DOUGLAS MACMILLAN, EXECUTIVE DIRECTOR, ENVIRONMENTAL TECHNOLOGY COUNCIL; AND VELMA M. SMITH, FRIENDS OF THE EARTH

Mr. MATTIA. Mr. Chairman, members of the subcommittee, my name is Carl Mattia. I'm vice president of environment, health and safety for BF Goodrich Company in Akron, Ohio. I'm presenting my testimony on behalf of the National Association of Manufacturers.

Before I start, though, Mr. Chairman, I'd like to say that I had the opportunity this morning before I left Cleveland to welcome the American League champion Cleveland Indians back home. A word for Mr. Norwood from Atlanta that he hasn't had his team play ball up in Cleveland at the new Jake Stadium yet, so I think he's in for a surprise.

On behalf of NAM and the BF Goodrich Company, I would like to commend you for your hard work and commitment to reforming the failed Superfund program and to thank you for the opportunity to testify today on the remedy selection and risk assessment provisions in your proposal.

We strongly support your efforts with respect to remedy selection and believe this proposal will enable the Superfund program to address actual risks more fully and expeditiously. Those who suggest this proposal will result in more lenient remedies do not understand the tremendous problems with the present law, much less the significant improvements that you are proposing.

In the interest of time, I will summarize our written remarks and respectfully request that the full text of the NAM testimony here today and the testimony presented back in May 1995 be submitted for the record.

Mr. OXLEY. Without objection.

Mr. MATTIA. The most universally shared understanding of our broad membership is the current Superfund program is not working. Likewise, we agree that the Superfund program is in need of reforms much greater than can be accomplished through the very limited regulatory actions taken by EPA. The NAM strongly believes legislation is required to correct the flaws statutory scheme established under the current law.

As you reauthorize this complex, costly and controversial program, the NAM is committed to working with you to enact responsible Superfund reform legislation that is simple, fair, efficient, protective of both human health and the environment and that recognizes the many demands of our Nation's limited resources.

Our members have great interest in the overall program proposed by you. However, the focus of our comments today will be on risk assessment and remedy selection provisions of title I.

The Superfund program must be designed to reduce actual risks at contaminated sites in an efficient and cost-reasonable fashion, given our environmental priorities and limited resources. Its provisions must be based on sound science, site-specific risk assessments, current and reasonably anticipated future resource use and remedies selected through cost-effective and cost-reasonable means.

The current remedy selection process often imposes unrealistic risk assumptions, costly but ineffective treatment technologies and inflexible requirements for treatment and permanence. As a result, remedies often do not achieve their goals and costs are excessively high and grossly disproportionate to the actual reduction of risk.

The risks associated with contaminated sites vary significantly from site to site. A new program must focus on the principal objective of quickly addressing the real risks posed by a limited number of sites.

The NAM strongly supports the goal of risk reduction at those sites that represent actual risk, as determined by a realistic, site-specific risk assessment. Further, any evaluation of risk requires consideration of the intended future use of the site and groundwater and should be calculated based on the actual conditions present at the site at the time of the review.

As you recognize, limited funding is available to finance cleanups. Your proposal would go a long way toward eliminating actual risks in a cost-effective manner, reducing the costs of cleanup and proceeding in a more efficient and rational fashion and should also reduce resources expended on unnecessary litigation and transaction costs.

In recent years, EPA has attempted several rounds of administrative improvements to the Superfund program, most recently this month. We have often been encouraged to see that EPA embraces many of the concepts advocated by manufacturers, particularly in the remedy selection area.

In the recent round of initiatives, the Agency speaks of such remedy reforms as encouraging cost-effective cleanup choices, ensuring remedies grounded in reality, and conducting risk-based priority-setting.

We are pleased to see the Agency recognizes that the serious problems associated with the remedy selection process under the existing statute need to be directly addressed. Regulatory action is not a solution, however. The key statutory provisions need to be changed. Administrative improvements to the Superfund program, by definition, are not sufficient.

EPA itself has repeatedly emphasized that there are limits to what the Agency can do within existing statutory authority. For example, the Agency cannot eliminate statutory preference for permanence in treatment. Nor can it address the concerns associated with applications of applicable and relevant and appropriate standards.

The goal of the Superfund program is to protect health and the environment at affected sites. Your proposal will go a long way to achieving that goal.

In conclusion, while the remedy selection is only one component of the Superfund program to be considered for reform by this subcommittee, it's integral to the success of the Superfund reform legislation. Your proposal is a good blueprint for ensuring that Superfund is protective of human health and the environment while, at the same time, addressing the manufacturing community's concerns that the Superfund program be more flexible and cost-reasonable.

This proposal has the right ingredients for more effective cleanup. We commend you for your efforts and we offer our support and continued work with this legislation.

[The prepared statement of Carl A. Mattia follows:]

PREPARED STATEMENT OF CARL A. MATTIA, VICE PRESIDENT, ENVIRONMENT, HEALTH AND SAFETY MANAGEMENT SYSTEMS, THE BFGOODRICH COMPANY, ON BEHALF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS

Mr. Chairman and members of the subcommittee, my name is Carl A Mattia. I am vice president of environment, health and safety management systems for the BFGoodrich Company in Akron, Ohio. I am presenting my testimony to you on behalf of the National Association of Manufacturers (NAM). The NAM is the nation's oldest and largest broadbased industrial trade association. Its more than 13,500 member companies and subsidiaries, including approximately 10,000 small manufacturers, are located in every state and produce roughly 85 percent of U.S. manufactured goods. Through its member companies and affiliated associations, the NAM represents every industrial sector, 185,000 businesses and more than 18 million employees.

On behalf of the NAM and The BFGoodrich Company, I would like to commend you for your hard work and commitment to reforming the failed Superfund program and to thank you for the opportunity to testify today on the remedy selection and risk assessment provisions in your proposal. We strongly support your efforts with respect to remedy selection and believe this proposal will enable the Superfund program to address actual risks more fully and expeditiously. Those who suggest this proposal will result in more lenient remedies do not understand the tremendous problems with the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or "Superfund"), much less the significant improvements that you are proposing.

In the interest of time, I will summarize our written remarks. I respectfully request that the full text of the NAM testimony be submitted for the record.

As a membership-driven organization, the NAM has placed considerable priority on Superfund reform-related activities. In 1988, the NAM first formed its Superfund Working Group expressly to bring together the experience and expertise of our membership as constituents of the regulated community under the CERCLA. As stakeholders with substantial technical and practical experience, the NAM has participated actively in all aspects of the effort by the Environmental Protection Agency (EPA) to implement a more effective Superfund program, and in prior congressional activity with respect to Superfund reform.

While I have already alluded to the diversity that exists among both business and regional interests within the NAM, possibly the most universally shared understanding of our membership is that the current Superfund program is not working. Likewise, we agree that the Superfund program is in need of reforms much greater than can be accomplished through the very limited regulatory actions taken by the EPA. The NAM strongly believes legislation is required to correct the flawed statutory scheme established under the CERCLA. As you reauthorize this complex, costly and controversial program, the NAM is committed to working with you to enact responsible Superfund reform legislation that is simple, fair, efficient and protective of both human health and the environment and that recognizes the many demands on our nation's limited resources.

Earlier this year, the NAM proposed what we consider to be essential elements for superfund reform. These elements are our guiding principles for Superfund reauthorization legislation. A copy of our principles statement is provided for your convenience at the end of our written comments. Our members have great interest in the overall program proposed by Chairman Mike Oxley. While the focus of our comments today is on the risk assessment and remedy selection provisions in Title I

of Chairman Oxley's proposal, we look forward to participating actively in other areas as well.

The Superfund program must be designed to reduce *actual* risk at contaminated sites in an efficient and cost-reasonable fashion given our environmental priorities and limited resources. Its provisions must be based on sound science, site-specific risk assessments, current and reasonably anticipated future resource use, and remedies selected through cost-effective and cost-reasonable means.

The current remedy selection process often imposes unrealistic risk assumptions, costly but ineffective treatment technologies, and inflexible requirements for treatment and permanence. As a result, remedies often do not achieve their goals and costs are excessively high and grossly disproportionate to any actual reduction of risk.

The risks associated with contaminated sites vary significantly from site to site. A new program must focus on the principal objective of quickly addressing the real risks posed by a limited number of sites. The NAM strongly supports the goal of risk reduction at those sites that represent actual risks as determined by a realistic, site-specific risk assessment. Further, any evaluation of risk requires consideration of the intended future use of the site and ground water, and should be calculated based on actual conditions present at the site at the time of review.

As you recognize, limited funding is available to finance cleanups. Your proposal would go a long way toward eliminating actual risks in a cost-effective manner. Reducing the costs of cleanup, and proceeding in a more efficient and rational fashion, could also reduce resources expended on unnecessary litigation and transaction costs.

In recent years, the EPA has attempted several rounds of "Administrative Improvements" to the Superfund program—most recently this month. We often times have been encouraged to see the EPA embrace many of the same concepts advocated by manufacturers, particularly in the remedy selection area. In its recent round of initiatives, the agency speaks of such remedy reforms as: encouraging cost-effective cleanup choices, ensuring remedies grounded in reality, conducting risk-based priority setting, and so on. We are genuinely pleased to see the agency recognizes that the serious problems associated with the remedy selection process under the existing statute need to be directly addressed.

Regulatory action is not a solution, however. The key statutory provisions need to be changed. Administrative improvements to the Superfund program by definition are not sufficient. EPA itself has repeatedly emphasized that there are limits to what the agency can do within existing statutory authority. For example, the agency cannot eliminate statutory preference for permanence and treatment. Nor can it address the concerns associated with the applications of applicable and relevant and appropriate standards (ARARs) in remedy selection.

Thus, while the EPA has taken steps in the right direction, we need legislation to improve the remedy selection process.

OXLEY REMEDY PROPOSAL

The goal of the Federal Superfund program is to protect human health and the environment at affected sites. The Oxley proposal would go a long way toward achieving that goal by establishing a rational process that would:

- Achieve expeditious abatement of significant, *actual* (rather than hypothetical or speculative) risks to human health and the environment through cost-effective methods derived from scientifically based risk analysis.
- Require that site-specific information be used to characterize site risks.
- Require consideration of current and reasonably anticipated future resource use and the timing of such use.
- Ensure early, adequate and appropriate public participation in the remedy selection process.
- Give equal consideration to all options for addressing a site, including: containment, treatment, institutional controls and natural attenuation, a combination of these, or other alternatives.
- Recognize limitations of currently available technology.
- Promote and employ both innovative and cost-effective technologies in remedy selection that ensure long-term cleanup reliability.
- Avoid conflict with other environmental laws.
- Maintain the emergency actions part of the existing Superfund law to provide emergency cleanups to eliminate serious risks.

The NAM commends the chairman for including Resource Conservation and Recovery Act (RCRA) language in his proposal. Consistency in the implementation of these statutes is desirable and necessary.

CONCLUSION

While remedy selection is only one component of the Superfund program to be considered for reform by this subcommittee, it is integral to the success of Superfund reform legislation. Remedy selection is also a particular priority of the National Association of Manufacturers.

The Oxley proposal is a good blueprint for ensuring that Superfund is protective of human health and the environment, while at the same time addressing the manufacturing community's concerns that the Superfund program be more flexible and cost reasonable. This proposal has all the right ingredients for a more effective cleanup program.

We commend you for moving the legislative process forward. We believe that Superfund reform is critical and very much want to see appropriate reform legislation enacted this year. For every year reform is delayed, the public and manufacturers will spend millions of dollars on a wasteful, inefficient program that, thus far, has been ineffective in achieving its goal of protecting human health and the environment. The Oxley Superfund proposal would dramatically improve the remedy selection program. Let's get on with the legislative process.

I have presented to you today our views on several of the key issues contained within the broader topic of remedy selection. There are additional issues beyond remedy selection, on which I and the associated members of the NAM will be glad to work with the subcommittee during the course of marking up this meaningful legislation.

At this time, I would like to thank you for the opportunity to testify, and I will be glad to respond to your questions.

Mr. OXLEY. Thank you, Mr. Mattia.

Dr. Bone.

STATEMENT OF LARRY BONE

Mr. BONE. Good afternoon, Mr. Chairman. My name is Larry Bone. I'm manager of environmental remediation for the Dow Chemical Company. For the past 15 years I've managed a substantial portion of Dow's remediation efforts. These include Federal and State Superfund sites, RCRA corrective action facilities, and our extensive voluntary cleanup initiatives.

I'd like to thank you for the opportunity to appear here before you today on behalf of the NEDA RCRA project and the American Iron and Steel Institute. In particular, we commend the chairman for recognizing the importance of RCRA remediation reforms. We have spent several years trying to achieve much needed common sense reforms in the administrative setting.

It is apparent, however, that despite EPA and State desires to drastically reform the RCRA remediation program, the current statute is insufficiently flexible. Title IX of the draft bill will effectively preclude mandatory application of RCRA standards which were designed for the management of routinely generated process wastes from manufacturing operations. These standards are inappropriate for one-time cleanups in remediation settings and often lead to, frankly, doing the wrong things.

This reform is critical. About 6,100 facilities are subject to RCRA corrective action and its regulatory requirements extend to Superfund cleanups and tens of thousands of voluntary and brownfield cleanup sites where there is hazardous waste contamination.

Based on EPA's proposed regulatory approach, the University of Tennessee estimates that RCRA corrective action will cost 50 percent more than Superfund. EPA's own analysis in 1993 depicted a program with costs exceeding monetized benefits by 7 times. Title

IX will help to ensure that RCRA's remedial program does not fulfill this bleak analysis.

Our review of this portion of the bill reveals a moderate, common sense approach to problems we currently face and parallels the growing consensus among industry and experienced States, and I was pleased to see that ASTSWMO entirely endorsed title IX.

The bill would allow remediation waste to be removed entirely from the regulatory straightjacket of process waste management standards under RCRA's hazardous waste program. Instead, remedial requirements are developed on a site-specific basis and specified in a remedial action plan. This plan is also fully enforceable and it's developed with full public input.

This concept properly recognized what is apparent to all of us who work this on a daily basis, and frankly, I would include myself and the States; you heard that what is really needed if you're working in the front lines of this, it's essential that the programs be tailored to requirements and be developed on a site-specific basis, considering site-specific characteristics of the waste and that site.

The draft properly recognizes the growing vibrancy of State remediation programs and largely defers to those programs. A recent EPA-ASTSWMO report noted that site work had been completed at about 2,700 sites under State programs and only about 150 under Federal programs.

As further evidence of these programs' growing strength, the study found that over 90 percent of the State actions occurred just in recent years, from 1986 through 1992.

The bill provides EPA with the authority to review the adequacy of State programs in a flexible and streamlined manner to ensure that they will provide cleanups that are protective of human health and the environment. Importantly, however, the bill does not require the States to mirror the Federal program.

Since 1984, EPA has been attempting to finalize the Federal corrective action program. In the continuing absence of this program, 24 States have received authorization to clean up corrective action sites and most States have other programs that are effectively cleaning up sites on a daily basis. Requiring States to mirror a Federal program will only further delay cleanup and constrain the growing sophistication and innovation that are the hallmarks of these State programs.

The bill recognizes the need for a strong enforcement and public participation. In our opinion, no cleanup can successfully be undertaken unless the local community is fully involved with our efforts. Strong enforcement is essential to ensure that the protections built into the remedial action plan are complied with and that the activities are undertaken in accordance with this plan.

Finally, the draft title will establish remedy selection requirements for corrective action sites. In light of the potentially enormous costs and the limited benefits for the RCRA corrective action programs, these provisions are needed to assure that we have a cost-effective yet protective program.

The current statute is silent in terms of how remediation is to be conducted, and these provisions will ensure that EPA's own stat-

ed goal that corrective action and Superfund remedy selection alike would be achieved.

These changes to the RCRA statute will ensure that active manufacturing facilities remain viable operations and assets to their community, promote greater use of voluntary programs, and remove existing impediments to the redevelopment of brownfields sites. Thank you.

[The prepared statement and attachment of Larry Bone follow:]

PREPARED STATEMENT OF LARRY BONE, MANAGER OF ENVIRONMENTAL REMEDIATION, THE DOW CHEMICAL COMPANY ON BEHALF OF THE AMERICAN IRON AND STEEL INSTITUTE AND THE NATIONAL ENVIRONMENTAL DEVELOPMENT ASSOCIATION'S RESOURCE CONSERVATION AND RECOVERY ACT PROJECT

The American Iron and Steel Institute ("AISI") and the National Environmental Development Association's Resource Conservation and Recovery Act Project ("NEDA/RCRA") wish to thank the Subcommittee on Commerce, Trade and Hazardous Materials for the opportunity to present testimony on the corrective action and land disposal restriction requirements of Subtitle C of the Resource Conservation & Recovery Act ("RCRA"). AISI and NEDA/RCRA wish to thank Representative Oxley and this Subcommittee for their leadership in examining needed legislative reforms to the statutes governing remediation of contaminated sites in the United States. In particular, AISI and NEDA/RCRA commend the Chairman for recognizing the importance of these issues, offering H.R. 3620 to remedy the cost-ineffective nature of forthcoming land disposal restrictions rulemakings, and including as part of his Superfund Reform principles the need to address RCRA remediation requirements concurrently with Superfund reauthorization.

AISI is an international trade association whose U.S. member companies account for approximately seventy percent of the nation's steel production capability. NEDA/RCRA is a cross-industry coalition of major companies seeking innovative solutions to solid and hazardous waste issues. Members of the NEDA/RCRA Project include AT&T, The Chevron Corporation, The Dow Chemical Company, IBM Corporation, Kaiser Aluminum and Chemical Corporation, Kimberly-Clark Corporation, OHM Corporation, Phillips Petroleum, The Procter & Gamble Company, and Texaco Incorporated. The member companies of AISI and NEDA/RCRA are subject to the full panoply of RCRA hazardous waste regulatory requirements, including the corrective action and land disposal restriction provisions of that statute. Accordingly, the implementation of those provisions in a manner that is both environmentally protective and cost-effective is of paramount importance to those companies.

SUMMARY OF STATEMENT

- The impact of the RCRA corrective action program—both in terms of the number of sites affected and the total costs of the program—will likely exceed that of the Superfund program. As interpreted and implemented by the Environmental Protection Agency ("EPA" or the Agency) to date, the corrective action program will impose staggering costs that simply cannot be justified by the benefits that EPA believes may be derived. Consequently, timely legislative consideration of the structure and objectives of both programs is critical.
- As is the case with the remedy selection provisions of Superfund, remedy selection for corrective actions under RCRA merit legislative clarification. In most cases, the legislative reforms to the Superfund remedy selection process currently being debated in Congress are equally germane to the RCRA corrective action program. Elimination of statutorily-imposed treatment requirements and the need for realistic risk assessments, flexible and balanced remedy decision requirements, and consideration of the nature and timing of the use for groundwater should be incorporated into RCRA cleanups. Certain elements of the RCRA statutory scheme—and certain characteristics of RCRA corrective action facilities—may warrant, however, special legislative attention. For example, unlike Superfund sites which are oftentimes characterized by unrestricted access to the site due to the lack of viable owner and ongoing operations, RCRA corrective action facilities typically involve financially viable owners capable of restricting—and legally required to restrict—public access. Moreover, unlike most Superfund sites, RCRA corrective action facilities are normally active industrial operations and will remain so, providing an economic benefit to the community.
- To further promote expeditious and cost-effective cleanups, remediation wastes being managed under the oversight of competent regulatory agency oversight

should be exempted from classification and regulation as hazardous wastes. Instead, waste management requirements should be determined on a site-specific basis by EPA or the RCRA-authorized state. This will preclude wasteful expenditure of resources through the automatic imposition of inappropriate standards at these facilities, account adequately for their individual characteristics, and allow facilities to be addressed in a more holistic manner instead of the current focus on cleanup of all releases from individual solid waste management units.

- To preserve the financial ability of the facility owner solely responsible in the first instance to undertake long-term corrective measures and thereby prevent these facilities from becoming sites that need to be addressed with Superfund monies, RCRA should expressly provide for workable financial assurance mechanisms. Furthermore, the timing of imposition of remediation requirements at facilities subject to RCRA hazardous waste permitting should not be tied statutorily to the issuance of a final operating permit. This will preclude skewing of agency action on either permitting or corrective action priorities.
- In order to ensure the proper integration of RCRA, the Clean Water Act, The Safe Drinking Water Act, the Clean Air Act, and state groundwater protection programs the RCRA land disposal restrictions program should be amended to exclude from its coverage formerly characteristic hazardous wastes that are managed as non-hazardous wastes in : (i) a wastewater treatment facility whose discharge is regulated under the Clean Water Act, (ii) a Clean Water Act-equivalent treatment facility, or (iii) a Class I injection well authorized or permitted under the Safe Drinking Water Act.

THE RCRA CORRECTIVE ACTION PROGRAM

The importance of prompt legislative reform

Significant legislative attention has been devoted this year to reform of the Federal Superfund program, which virtually all concerned agree is in need of substantial and immediate improvement to ensure that the resources of this country are properly directed to cost-effective remediation of contaminated sites that truly present significant risks. However, we urge the Subcommittee to keep in mind that although remedy selection reform under Superfund is very important, it will not directly address the vast majority of sites in the United States for which remediation will be required. For many companies, their responsibilities under the RCRA corrective action provisions are likely to far exceed their Superfund involvement. Moreover, the remediation standards under those provisions have significant impacts not only at corrective action sites, but also at Superfund sites as applicable or relevant and appropriate requirements ("ARARs") and during state remediation programs and voluntary cleanups for the purpose of redeveloping industrial sites for other beneficial community or commercial uses.

In fact, the RCRA corrective action program has the distinct potential to exceed the Superfund program substantially in terms of total costs and far surpass it with respect to the number of sites addressed. Approximately 6,100 facilities, with over 100,000 solid waste management units ("SWMUs"), are within the current universe of sites subject to the RCRA corrective action program (as compared to approximately 1,250 sites on the Superfund National Priorities List). Given this large universe of RCRA sites and the approach taken thus far by EPA in implementing the corrective action program, the costs of the program are projected to be enormous. For example, EPA's initial 1990 regulatory impact analysis ("RIA") accompanying its 40 C.F.R. Part 264, Subpart S proposed rule ("Subpart S rule") to implement the statutory provisions estimated the total cost of this program to be between $5 billion and $490 billion in non-discounted dollars. Another study conducted in 1991 by the University of Tennessee estimated remedy implementation costs as high as $234 billion in non-discounted dollars—exclusive of the costs associated with remedy investigation and design. (The same study estimated the non-discounted costs of the Superfund program at $151 billion.) One further study conducted by the Chemical Manufacturers Association in 1990 estimated costs as high as $850 billion. Finally, a study performed on behalf of AISI concluded that costs would approach $3 billion for the steel industry alone. Further information on these and other studies assessing the likely costs of the RCRA corrective action program are provided in Appendix I attached to this testimony.

More recent EPA analysis raises serious questions as to whether these extraordinary costs are justified in light of the expected benefits. In 1993, EPA conducted a second, more focused RIA of its Subpart S rule. For this analysis, 70 industrial and 9 Federal facilities (a stratified random sample of the RCRA universe) were selected and evaluated by Agency and expert personnel for remedy selection and remedy costs. This study revealed that if implemented in accordance with EPA's pro-

posal, the RCRA corrective action program ultimately will be extremely costly, with few concomitant benefits.

The 1993 RIA estimates total program costs to be $18.7 billion (present value), with total monetized benefits of only $2.59 billion (present value). Most of these projected benefits, $2.3 billion, are attributable to the altruistic non-use value of groundwater, calculated by a highly controversial methodology which was discredited by EPA's Science Advisory Board.

This analysis also indicates that relatively few facilities present actual risk, and most of the risk is projected future risk. Almost all risk reduction benefits from the program would occur at the end of a 128-year period, with 9 percent of the facilities presenting almost all of the risks. Although most of the benefits were derived from groundwater cleanup, one facility accounted for all of the groundwater risk and most of the remaining risks in the study. For this one facility, $5 million for point-of-use water treatment would provide most of the health benefits.

Furthermore, to obtain even these limited risks and benefits, EPA relied on several unlikely and highly unrealistic scenarios. It was assumed, for example, that all RCRA facilities will be converted from industrial to residential and agricultural land use and that all institutional controls will fail. Furthermore, while it was assumed that many remedies would not be implemented until after 2000 and not be fully effective until 2100, EPA's analysis assumed that future residential/agricultural use would begin in 1992. Finally, to assess the high-end cancer range, EPA assumed that people will be drinking water from municipal water systems at above Safe Drinking Water Act Maximum Contaminant Levels ("MCLs") and odor and taste thresholds.

A large percentage of the enormous costs associated with the corrective action program derives from the same inflexible and overly conservative requirements that hamper the Superfund program. Often where industry has creative ideas about corrective measures, or perhaps innovative technologies, that will be adequately protective of human health and the environment, the rigidities of the RCRA statute and its corrective action program prevent use of those innovative approaches. These same problems also pose obstacles to the many companies seeking to undertake voluntary corrective action.

The problems with the current statutory scheme

Section 3004(u) of RCRA "require[s] corrective action for all releases of hazardous waste or constituents from" all SWMUs anywhere within the property boundaries of a facility seeking a RCRA permit after November 8, 1984. This statutory focus on cleanup of all releases from SWMUs anywhere at a RCRA facility is a principal source of the cost-ineffectiveness of the corrective action program. EPA has interpreted this language in its Subpart S rule as requiring—or at least authorizing—cleanup of contaminated groundwater to health-based standards at the downgradient SWMU boundary and of contaminated soil at any point within the facility property boundaries where direct contact exposure may conceivably occur, regardless of whether there is any actual or plausible exposure or significant risks to actual or reasonably foreseeable receptors in light of current and reasonably anticipated land or ground or surface water uses. When coupled with the lack of an express statutory requirement that RCRA corrective actions be cost-effective, the SWMU focus has resulted in a program whose costs greatly exceed any benefits that may potentially accrue.

Before discussing our recommendations, we should also note that AISI and NEDA/RCRA have been working with EPA on possible administrative resolution of industry concerns about the corrective action remedy selection process. However, it is not clear to us that the dialogue in connection with the Hazardous Waste Identification Rule ("HWIR"), particularly with respect to contaminated media, will provide the requisite relief on aspects of corrective action that are unnecessarily burdensome. Our review of the current draft proposal indicates that this rulemaking may in fact complicate cleanups, further bureaucratize cleanup decisions, and result in greater costs and delays. Moreover, while the Corrective Action Management Unit ("CAMU") concept provides some welcome flexibility in the determination of what management standards will apply to remediation wastes under the corrective action program, its effects are limited, and it is currently the subject of judicial challenge. AISI and NEDA/RCRA therefore believe it is necessary to seek legislative changes in Section 3004(u) and related authorities, and so informed EPA during RCRA "legislative rifleshot" discussions earlier this year.

Consequently, we applaud the Subcommittee's hearing today on this important issue and the inclusion of this issue in the Chairman's recently released Superfund reform principles. AISI and NEDA/RCRA will continue to cooperate with the Sub-

committee, EPA, states, and other stakeholders on this issue in developing improvements to the RCRA corrective action program.

Recommended legislative principles

In order to foster implementation of an environmentally protective, cost-effective RCRA corrective action program that encourages expeditious cleanup, we recommend that RCRA be amended to incorporate the principles set forth below. These principles are combined into four related clusters: remedy selection and prioritization of corrective action measures; RCRA process waste management standards; RCRA-specific issues; and clarification of Federal/state agency roles.

(1) *Remedy selection and prioritization of corrective action measures*

- Facilities subject to corrective action requirements should be prioritized so that action is taken first at those facilities—or portions of facilities—where the action would make the most significant change in risk.
- Although releases of hazardous constituents from SWMUs should constitute the jurisdictional predicate for evaluating the need for corrective action, corrective measures should only be required to the extent, and at locations, necessary to prevent significant risks from releases from the facility to actual or reasonably foreseeable receptors.
- The determination of "significant risk" should be based on actual or plausible exposure to actual or reasonably foreseeable receptors, based on site-specific analysis of current and reasonably anticipated land, ground water, and surface water use.
- National uniform cleanup standards should be eschewed in favor of remedies determined on the basis of site-specific risk assessments that employ existing and reasonably available site-specific information, or, where such information is unavailable, incorporate reasonable health effects, environmental fate and transport, and exposure assumptions.
- A full range of corrective measures should be evaluated on an equal footing for implementation as appropriate. These measures should include treatment and disposal, containment, institutional controls, and natural attenuation. In the case of groundwater contamination, treatment at the tap or wellhead should be expressly recognized as an available alternative.
- Corrective measures should be imposed only where the costs are justified by the benefits (excluding non-use benefits) to be derived from them. Where no such justification is apparent, the focus of corrective action should be on more limited actions designed to stabilize site conditions and, where necessary, prevent actual harmful exposure to current receptors.
- Individual corrective measures selected should be cost-effective and technically practicable.
- The schedules for, and nature of, corrective measures should be consistent with the immediacy and extent of the risks posed by conditions at the facility.

It is this cluster of RCRA corrective action issues that is most similar to reform of cleanup requirements under CERCLA. As noted above, the potential cost of corrective action requirements is staggering. Clearly, with limited industry and EPA resources, we must find a way to establish priorities among the many potential needs to take corrective action. This program therefore must focus on actions needed to mitigate actual threats to human health and the environment. To make the most of scarce resources, the corrective action program should work to mitigate realistic, significant threats to plausible receptors in the near term at as many facilities as possible, rather than seeking cleanup to pristine levels at a relatively few facilities regardless of whether that cleanup is necessary to address plausible risks in the short term. This objective can oftentimes be accomplished by requiring facilities to stabilize onsite contamination to mitigate such threats. This strategy, and the judicious choice of remedies on a site-specific basis, will allow us to derive the greatest environmental benefit from the resources expended.

EPA's current corrective action program in part focuses on the stabilization concept which consists of taking the necessary corrective measures to abate actual risks to human health and the environment, and to prevent the spread of contamination that could realistically lead to such risks. The determination of actual risks requiring action is closely tied to realistic assumptions about land use. Stabilization actions can include source control, treatment or removal, capping, hydraulic remediation or containment, physical barriers, or combinations of these, in conjunction with robust institutional controls. Stabilization actions must then be revisited and upgraded as necessary, whenever land use or other significant changes occur, to assure that corrective measures remain protective. This approach, using the stabilization concept, allows effective risk reduction actions to be taken at a large number

of facilities in a relatively short period of time, rather than spending a long period of time to return a few facilities to pre-industrial conditions. Unfortunately, EPA's current policy inappropriately recognizes this important concept only as an interim measure and never as the final remedy.

In this regard, we were heartened by EPA's recent announcement of a new policy with regard to land use considerations in Superfund remedy selections (see 60 Fed. Reg. 29595 (June 5, 1995)), which hopefully will heighten the importance of such considerations in selecting certain remedies under that statute. However, we were disappointed that EPA's new guidance did not address consideration of groundwater uses and was not made applicable to RCRA corrective action sites.

Remedy selection for groundwater should include a consideration of the current and future use of the resource, including both the nature and timing of uses. The remedy selection should consider a range of possible remedies including pump and treat, containment and natural attenuation, and point of use treatment. The application of possible remedies should be evaluated against appropriate balancing factors to determine the most cost-effective remedy that protects human health and the environment and that is technically feasible.

Therefore, our proposed approach to remedy selection is a blend of requiring facilities subject to RCRA corrective action obligations to address upfront, as necessary, any immediate significant risks to current receptors; undertake near-term containment and stabilization measures; and make a long-term commitment to monitor and review land and water use at, and surrounding, each site to ensure that human health and the environment will be protected, consistent with actual land and water use, through implementation of any additional necessary corrective measures. This approach is phased and measured, and provides the opportunity to develop and refine remediation goals as conditions and land use change and innovative technologies develop.

It is a general theme of these principles that corrective measures should be cost-effective and technically practicable. This means that they have to be reasonable and capable of timely implementation, and should be targeted on the most serious risks. Considering cost-effectiveness in corrective measures selection requires the comparison of the cost-effectiveness of alternative measures which provide equally adequate protection of human health and the environment. It also requires consideration of whether the incremental benefits of what may be a somewhat more protective remedy are justified by the incremental costs of achieving it.

(2) *RCRA process waste management requirements*

- All remediation wastes being managed at facilities subject to RCRA corrective action requirements should be excluded from classification and regulation as hazardous waste. Instead, in order to prevent the disincentives to more active and expeditious remediation created by application of hazardous process waste regulatory controls ill-suited to a remediation context, EPA or the RCRA-authorized state should determine waste management requirements on a site-specific basis. This approach would be consistent with the contemplated elimination of ARARs from Superfund remedy selection.
- Similarly, remediation wastes managed during voluntary cleanups, cleanups conducted under other state remediation programs, or accelerated corrective actions that are approved and overseen by a regulatory agency should be excluded from classification and regulation as hazardous waste. This will eliminate impediments to these cleanups and thereby increase both the number and pace of these cleanups, while maintaining adequate safeguards to protect human health and the environment.

RCRA hazardous waste statutory and regulatory requirements (*e.g.*, the land disposal restrictions ("LDRs") and minimum technological requirements ("MTRs") of Subtitle C) should not apply automatically to management of contaminated media or other remediation wastes. These requirements are oftentimes both ill-suited and counterproductive in the remediation context. LDRs and MTRs, for example, were developed to prevent newly generated wastes from being placed on the ground without treatment. Remediation wastes are already on, or in, the ground. Moreover, LDRs were established to encourage waste minimization. In a remediation context, it may be necessary or useful to seek to maximize the amount of contaminated media exhumed and managed. Finally, historic wastes to be remediated are typically mixed with environmental media, making treatment substantially more difficult.

Under current EPA regulations, active management of contaminated material containing any concentration whatsoever of a hazardous constituent from a listed hazardous waste is subject to the full LDR and MTR (and other hazardous waste regulatory) requirements. This result is counterproductive when it prevents tem-

porary staging or storage of the material in protective land-based units (*e.g.*, lined piles) prior to ultimate management, and acts as a disincentive to sensible treatment or redeposition of the material in a more secure setting which does not technically meet the LDR or MTR requirements.

In a remediation context in which EPA or an authorized state both approves and oversees a site-specific remediation action plan, there is no need for the Agency to assume that remediation wastes containing either meaningful or insignificant concentrations of hazardous constituents will be mismanaged, thereby necessitating their classification and full regulation as hazardous waste under controls intended for ongoing, unsupervised industrial operations, not one-time remediation activities supervised by Federal or state environmental agencies. Instead, it is reasonable to assume that government remedial project managers can and will make sensible site-specific decisions regarding management standards for such wastes to ensure expeditious, protective, and cost-effective cleanup.

In its CAMU rule, EPA generally endorsed the concept of exempting corrective action remediation wastes from LDR and MTR requirements in limited circumstances. Such needed reforms are also the subject of the ongoing HWIR contaminated media dialogue. However, EPA is poised to issue a proposed HWIR rule this fall that will both continue to classify and regulate as hazardous a substantial percentage of remediation wastes nationwide and eliminate the CAMU rule. Because the Agency has questioned its legal authority under RCRA to exempt all remediation wastes currently classified as hazardous from Subtitle C controls when those wastes are managed pursuant to a site-specific, enforceable remediation action plan overseen by EPA or a qualified state, legislative clarification and direction is essential to ensure that such wastes are not classified as hazardous wastes subject to the full panoply of Subtitle C controls established for process wastes.

Similarly, hazardous waste permits should not be required for on-site remediation activities (such permits are not required under CERCLA) or for other remediation activities specified in a corrective action plan. However, approval of the corrective action plan by either EPA or a State, with appropriate public review and input, should still be required and the plan should be enforceable by the agency approving it.

While RCRA process waste regulatory and permitting standards often unnecessarily impede cleanup of RCRA corrective action facilities, their application is equally problematic at the large number of contaminated sites that are not subject to RCRA (or Superfund) cleanup authorities. The application of these standards often make facility operators or prospective purchasers of those facilities reluctant to step forward voluntarily to address contamination at these sites. Because such cleanups often involve onsite, temporary storage and/or treatment of contaminated media currently classified as hazardous regardless of the concentration of hazardous constituents present, they are oftentimes subject to the regulatory straight-jacket for RCRA hazardous wastes. Even more problematic, they may require a RCRA permit for these temporary activities, and thus be subject to the undue delay and cost that have become a hallmark of the RCRA permitting program.

Absent resolution of this issue, existing industrial infrastructure will continue to be underutilized and "greenfields" development will continue. Simply put, the structure of Federal cleanup programs leaves site owners and prospective purchasers with a dilemma. If they want to undertake a cleanup, they often conduct less than optimal remediation in order to avoid RCRA process waste standards and potentially subjecting the facility to RCRA's facility-wide corrective action requirements due to the need for a RCRA permit. However, if the facility is not adequately cleaned up, it ultimately may need to be addressed by the Superfund program or comparable state authorities. To make matters worse, current owners are often reluctant to sell the facility, even after undertaking a state-approved voluntary cleanup, due to Federal Superfund liability concerns. Many of these facilities, therefore, continue to operate at less than full capacity or are moth-balled rather than being sold to a willing purchaser who may be interested in redeveloping the property in a manner providing substantial benefits to the local community. Accordingly, Congress should evaluate Federal legislation that facilitates elimination of regulatory and liability impediments to such industrial redevelopment and encourages remediation under existing and emerging state voluntary cleanup programs.

(3) *RCRA-specific issues*

- EPA should be directed to establish financial assurance mechanisms that are flexible enough to ensure the financial ability of the facility owner to continue in business and fulfill any long-term corrective action obligations.
- In particular, EPA should be required to establish financial assurance requirements that (i) impose financial assurance obligations only once the specific cor-

rective measures have been selected; (ii) utilize a phased, "rolling average" mechanism whereby a facility owner would demonstrate the ability to fund the corrective measures to be implemented for the next few years, rather than the total costs of all corrective measures ultimately to be undertaken at the facility; (iii) allow for use of a combination of financial assurance mechanisms, *e.g.*, insurance, financial guarantees (including a guarantee by a non-parent entity with a business interest in the economic viability of the facility involved), surety bonds, letters of credit, trust agreements, and qualification as a self-insurer; and (iv) reflect, for purposes of qualification as a self-insurer, changes in generally accepted accounting practices, such that non-recurring and non-cash charges, like Other Post-Employment Benefits, are not treated as roductions in net income, total net worth, or total working capital.

- The corrective action implementation process should be separated from the facility's RCRA operating permit, so that the corrective action process does not proceed by way of the cumbersome, time-consuming permit process but by other enforceable means.

Section 3004(u) of RCRA states generally that assurances of financial responsibility for completing corrective action shall be required. EPA has proposed to extend financial assurance requirements to all solid waste management units requiring remediation under the corrective action program. Although specific financial assurance requirements have not yet been established in a final regulation, the Agency's proposed rules would require financial assurance for corrective action under essentially the same mechanisms EPA applies to active hazardous waste management units at operating facilities. The rules for active units allow three types of mechanisms for demonstrating financial assurance: (1) setting aside funds in a trust fund; (2) obtaining a third-party guarantee of an available source of funds (*e.g.*, a letter of credit or insurance); or (3) passing a test of corporate financial strength, as a self-insurer.

The costs of corrective action, whether on a facility-wide basis or for a company with several facilities subject to corrective action, are potentially massive. Consequently, the traditional methods of demonstrating financial assurance for newer, active units that may present more limited remediation issues are not viable for Section 3004(u) purposes. Traditional financial assurance mechanisms, in most cases, must be fully collateralized; that is, each dollar of required financial assurance must be guaranteed by a real dedicated dollar set aside. These mechanisms are impractical for the large costs of the corrective action program. Conventional commercial insurance is not available except on a fully collateralized basis. Captive insurance companies have only limited applicability, especially since state insurance regulators require greater liquidity (cash equivalent assets) in the captive insurer as the size of the exposure increases.

Moreover, self-insurance is oftentimes not an option, because the financial tests that companies must meet require that net worth and working capital equal at least 6 times the potential environmental cleanup liability, and that operating income be at least 10% of total liabilities. The high cost of corrective action makes it unlikely that even healthy companies could meet this test.

We recognize that a workable financial assurance system is essential to full use of the RCRA corrective action strategy we are recommending. At the same time, in order to preserve the financial ability of facility owners to undertake both short- and long-term corrective measures and thereby prevent those facilities from becoming sites that need to be addressed with Superfund monies, RCRA should expressly provide for feasible yet protective financial assurance mechanisms along the lines outlined above.

Finally, the corrective action implementation process should be decoupled, or separated, from the process of granting the Subtitle C operating permit for a facility. Permits for TSDF operation should be considered and issued separately from imposition of their corrective action requirements. RCRA permitting is a time-consuming process which slows down cleanups; likewise, operating permits should not be slowed by the need to work out the details of a remediation program for the facility, as long as there is an enforceable requirement in the permit that will lead to the timely adoption and implementation of corrective measures.

(4) *Clarification of federal/state agency roles*

- Corrective action for a specific site should be the responsibility of either the Federal or the relevant state government, but not both.
- After successfully undertaking an agency-approved cleanup, the person undertaking that cleanup should not required to undertake further cleanup for any areas of contamination addressed by that cleanup.

The respective roles of the Federal and state governments in the corrective action process should be clarified so that only one entity has responsibility for a particular facility. In this way, the facility owner will not be placed in the untenable position of addressing conflicting, or duplicative, demands of two "masters." Moreover, when a state has the authority to implement RCRA corrective action requirements, it should have the flexibility to require corrective measures be carried out pursuant to state authorities other than RCRA or state Superfund laws (*e.g.*, groundwater protection authorities).

In addition to the single master issue, it is equally important to address the issue of "certainty in remedy selection" or "finality." Compliance with an EPA or state-approved remedy should preclude further remedial action or liability on the part of the private party undertaking the remediation unless the facility investigation missed a type or source of contamination, there is failure of control measures, or significant changes in land use occur. This issue is of particular importance where a facility owner or private party voluntarily steps forward to work with the regulatory agency and local community to address contamination at a facility through either an accelerated corrective action or a voluntary cleanup under a state program.

THE LAND DISPOSAL RESTRICTIONS PROGRAM

The RCRA LDR program has provided a useful purpose in protecting against potential risks posed by land disposal of hazardous wastes in RCRA-permitted landfills without prior treatment and in encouraging waste minimization. However, because the Agency has adopted a technology-based, rather than risk-based, approach to implementing the LDR program, it is critical that the LDR statutory provisions not be interpreted or used in a manner that imposes significant costs without a concomitant benefit in risk reduction, or to address risks already being addressed under other environmental statutes and programs.

A relatively recent judicial decision of the D.C. Circuit is particularly troubling and problematic in this regard. In *Chemical Waste Management, Inc. v. EPA*, 976 F.2d 2 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1961 (1993) ("*Chem Waste*"), the D.C. Circuit overturned certain portions of EPA's so-called "Third Third" LDR rulemaking which, among other things, established treatment standards for "characteristically hazardous" wastes which, though hazardous at their point of generation, are rendered non-hazardous before being managed in surface impoundments regulated under the Clean Water Act ("CWA") or underground injection control wells regulated under the Safe Drinking Water Act ("SDWA").

EPA has interpreted that decision, whose language is confusing and ambiguous, as holding that: (1) the Agency may require treatment under Section 3004(m) of RCRA to more stringent levels than those at which the wastes are identified as hazardous, (2) Section 3004(m) requires not only removal of the characteristic that renders the waste hazardous but also destruction and removal of hazardous constituents in the waste, and (3) management of decharacterized waste streams in centralized wastewater management land-based units (*i.e.*, Subtitle D non-hazardous surface impoundments or Class I non-hazardous injection wells) is lawful only if it can be demonstrated that hazardous constituents are reduced or destroyed to the same extent they would be pursuant to otherwise applicable treatment standards. The *Chem Waste* decision thus requires EPA to impose LDR treatment standards on wastes that heretofore have been regulated under the CWA and SDWA, but not under RCRA, *i.e.*, on wastes that are non-hazardous at the time they are land disposed.

This interpretation of the *Chem Waste* decision has led EPA to propose a RCRA rule (the so-called "Phase III" rule) that could require, for example, that facilities that manage decharacterized wastewaters in surface impoundments subject to CWA regulation seek amendments to their CWA discharge permits if (i) those permits did not establish discharge limitations for hazardous constituents present in the wastewater at its point of generation at levels above technology-based Universal Treatment Standards ("UTS"), and (ii) those UTS were not met for any such constituent at the point of ultimate discharge. *See* 60 Fed. Reg. 11702 (March 2, 1995). This action could be required even though agency personnel administering the CWA program had already determined that the discharge involved was protective and lawful. Similarly, EPA is poised to issue a rulemaking proposal (the so-called "Phase IV" rule) that could require, among other things, that facilities address under RCRA air emissions, leaks, and non-hazardous sludges from CWA-regulated impoundments managing non-hazardous wastewaters.

In putting forth these rulemaking proposals, EPA has acknowledged that t risks addressed by these rulemakings "are very small relative to the risks present-

by other environmental conditions or situations....Nevertheless, the Agency is required [by the *Chem Waste* decision] to set treatment standards for these relatively low risk wastes and disposal practices during the next two years, although there are other actions and projects with which the Agency could provide greater protection of human health and the environment." 60 Fed. Reg. 11704. Therefore, EPA and the regulated community are being compelled to expend their limited resources to address under RCRA hazardous waste provisions relatively insignificant risks from these non-hazardous wastes despite the Agency's findings in the Third Third Rule that (i) "the treatment requirements and associated dilution rules under the CWA are generally consistent with the dilution rules under RCRA, and that EPA should rely on the existing CWA provisions," and (ii) application of the RCRA treatment requirements would not provide further protection to human health or the environment beyond that already afforded by the SDWA Class I regulatory program, as "disposal of these wastes by underground injection at the characteristic levels [is] as sound a practice as treating them." 60 Fed. Reg. 11704-705.

These rulemaking proposals threaten to disrupt treatment systems installed for CWA compliance purposes and, based on EPA's own regulatory impact analyses, impose substantial costs on owners and operators of both CWA treatment systems and SDWA underground injection wells in a substantial number of different industries without generating meaningful environmental benefits. Indeed, EPA itself has observed that the potential costs of these rules are very high compared to the admittedly low risks they address.

Consequently, we believe that Congress should statutorily overturn the *Chem Waste* decision and amend Section 3004 of RCRA to provide that any solid waste that formerly was identified as hazardous based solely on a characteristic of hazardous waste and that is (i) managed in a wastewater treatment facility whose discharge is regulated under the CWA, or that is determined to be a CWA-equivalent treatment facility, or (ii) injected into a Class I injection well authorized or permitted under the SDWA, is exempt from the land disposal restriction requirements of Section 3004 of RCRA if the waste has been rendered non-hazardous before it is land disposed. This action would restore the regulatory framework created by EPA's Third Third Rule, properly integrate the regulatory provisions of RCRA, the CWA, the SDWA and the Clean Air Act consistent with Section 1006 of RCRA and, based on EPA's own findings, be adequately protective of human health and the environment.

Because EPA is subject to a settlement agreement establishing tight deadlines for its Phase III and IV rules, Congress needs to act promptly to prevent this inefficient and unpreductive expenditure of government and private resources. We are gratified that Chairman Oxley introduced H.R. 2036 to address this issue and strongly support section 2 of this bill.

OTHER MUNICIPAL SOLID WASTE ISSUES

In addition to addressing the issues highlighted above, the Subcommittee is focusing on several issues dealing with municipal solid waste. While AISI and NEDA/RCRA members are not directly affected by these issues and cannot comment on them specifically, we understand that they seek to address a problem that is endemic to the RCRA statute—the lack of flexibility. RCRA is perhaps the most rigid and prescriptive environmental law. As a result, it is also probably one of the most burdensome and least cost-effective of our nation's environmental laws. In this regard, we commend the Chairman and Representative Cooley for attempting to begin the process of rationalizing and providing greater flexibility in RCRA.

Again, AISI and NEDA/RCRA wish to thank the Subcommittee for the opportunity to present testimony on needed reforms to the RCRA corrective action and land disposal restriction programs. We would be pleased to answer any questions, and look forward to working with the Committee on legislation responsive to our concerns.

ATTACHMENT 1

RCRA CORRECTIVE ACTION COST ESTIMATES

The experience of individual companies that are currently remediation corrective action sites is illustrative of the current and future costs associated with the RCRA corrective action program. Furthermore, RCRA-imposed remediation standards have significant impacts not only on corrective action sites, but also impact voluntary cleanup facilities and Superfund sites.

- The Dow Chemical Company notes that its corrective action liability will greatly exceed its total Superfund liability.
- At a pulp and paper mill owned by the Kimberly-Clark Corporation, 17 drums of solvents were buried prior to 1987. By 1989, the site was remediated voluntarily, however, they were required subsequently to install 16 groundwater monitoring wells, with a total remediation cost-to-date of $1.17 million. It is expected that further EPA-mandated investigation studies will result in another $1 million in cost to study additional solid waste management units.
- Monsanto estimates that it could save between $5 million to $15 million at its active plant sites and between $15 million to $25 million at Superfund sites over the next 10 years if inappropriate Subtitle C process waste standards were not applied.
- The General Electric Company estimates that its total RCRA cleanup liability (both corrective action sites and state cleanup sites) will be between $400 million to $800 million for 124 sites.
- A consultant to the American Iron and Steel Institute estimates that RCRA corrective action program will approach $3 billion for the steel industry, based upon a hypothetical steelmaking facility with features, geological settings, and historical operations representative of a typical American steel plant if EPA requires use of the boundary of individual SWMU's as the point of compliance for groundwater standards. A supplemental study to evaluate changes to corrective action costs that accompany a shift in the compliance point for groundwater standards from the SWMU boundary to the facility boundary showed that such a change would result in corrective action cost reductions of at least 50 percent, without significantly reducing the degree of protection to human health and the environment.

In addition, at least five major analyses have examined the costs of remediating contamination at hazardous waste management facilities under RCRA corrective action program: The proposed Subpart S corrective action rule Regulatory Impact Analysis (RIA) (1990); The revised Subpart S corrective action RIA (1993); A Chemical Manufacturers Association Study (April 1988); The Oak Ridge National Laboratory (ORNL) Report (September 1991); and A paper by Paul Portney of Resources for the Future.

While the methods and scopes of these studies vary, they suggest that the present value cost of the RCRA corrective action program will be on the order of $20 billion to $90 billion dollars. For comparison purposes, the University of Tennessee estimates that the non-discounted "best guess" costs of the RCRA corrective action program to be $234 billion, while their non-discounted "best guess" costs for the Superfund program are $151 billion.

Proposed Subpart S Rule RIA

The draft RIA for the proposed Subpart S corrective action rule estimated the costs of *groundwater remediation only,* excluding the significant costs of soil and waste remediation. It analyzed a sample of 65 facilities subject to corrective action. It used EPA's Liner Location Model, which models releases, fate and transport, and remediation using standardized algorithms. The model also estimates remediation costs, using unit-cost algorithms based on EPA experience, professional judgment, and standard construction cost estimation techniques. EPA used the model to simulate four post-HSWA regulatory alternatives and a pre-HSWA baseline. Per-facility cost estimates were discounted using a 3 percent discount rate. EPA derived national estimates by multiplying per-facility estimates by the number of facilities in the universe. National estimates included RCRA Facility Investigation (RFI) costs, though per-facility estimates did not. The RIA estimated costs for Federal and non-Federal facilities separately. The results for the two scenarios most similar to the proposed rule were as follows: the mean present value cost per facility[1] ranged from $2.5 to $23 million for non-Federal facilities, depending on the regulatory option, and from $12 million to $110 million for Federal facilities. The Agency estimated total national costs for non-Federal facilities to be $7.4 to $42 billion; for Federal facilities, $2.9 to $25 billion. The RIA for the proposed rule did not estimate per-SWMU costs. These estimates are in 1987 dollars.

The Revised Corrective Action RIA

The 1993 revision to EPA's corrective action RIA analyzed a stratified random sample of 79 facilities subject to corrective action. It used expert panels of remediation and policy specialists to simulate the process of remedy selection at the sample facilities under the corrective action rule, and to prepare cost estimates for the rem-

[1] All costs presented here were incremental costs over the baseline.

edies selected. The analysis also included the cost of RFI's. Cost estimates were discounted to reflect the timing of remediations, using a 7 percent discount rate. Finally, sample facility cost estimates were extrapolated to the national level, using facility weights that reflect the sample selection process. EPA projected that the present value of the national costs of the corrective action rule will be about $19 billion (in 1992 dollars); the average present value cost per facility will be $7.2 million; and the average present value cost per SWMU will be $1.1 million. EPA's expert panel also noted in this document that the RFI costs are expected to range from $80 thousand to $16 million per facility, in undiscounted 1992 dollars. Furthermore, costs to complete RCRA Corrective Measures Studies (CMSs) are expected to range from $20 thousand to $56 million per facility, again in undiscounted 1992 dollars.

Oak Ridge National Laboratory Report

ORNL's analysis of corrective action costs did not use sampling to describe the universe of facilities subject to corrective action. Instead, ORNL used data on hazardous waste facilities from two databases to identify SWMUs potentially in need of remediation, and assumed these SWMU's represented the entire universe.[2] ORNL used engineering rules of thumb to assign remedial technologies to each SWMU, and estimated costs using the Cost of Remedial Action (CORA) model. ORNL did not include investigative costs in its estimates. Several scenarios with differing clean-up levels were analyzed: a base case, a less stringent option, and a more stringent option. In its original analysis, ORNL did not evaluate cost over time and did not discount its results. The average cost per SWMU in the base case was calculated to be $6.4 million, and the mean total cost of corrective action to be $240 billion (1990 dollars, undiscounted).[3] In a September 9, 1991, letter to EPA, Bruce Tonn of ORNL reported the results of analysis of corrective action costs over time, discounted at various rates. The basecase total present value cost at a 7 percent discount rate was $89 billion. [4]

Chemical Manufacturers Association Study

The Chemical Manufacturers Association's (CMA) study, prepared by Engineering Science (ES), estimated the cost of RCRA Corrective Action to the *chemical industry only*, which ES believed represented 25 percent of all facilities in the corrective action program. To estimate corrective action costs, ES surveyed 16 CMA plants that reported 147 SWMU's expected to require RFIs. For comparison, ES also used data from a 1986 CMA survey of 236 plants with 3,411 SWMUs requiring RFIs. ES assigned a degree of remediation to each SWMU in the database and estimated per-SWMU costs by SWMU type and degree of remediation required. The analysis included RFI costs. ES then extrapolated from the samples to the universe of chemical plants to derive national corrective action cost estimates for the chemical industry. ES presents total capital costs and present worth costs, but does not report a discount rate. They estimated capital costs of $5.4 to $9.1 billion dollars (depending on the database used) and present worth costs of $6.6 to $11 billion. Dividing by ES's estimated numbers of SWMUs requiring RFIs yields an average capital cost per SWMU of $290 to $770 thousand, and an average present worth cost per SWMU of $350 to $940 thousand (year of dollars not reported).

Paul Portney Paper

A final estimate of the costs of the corrective action program comes from Paul Portney at Resources for the Future.[5] Portney cited the uncertainty about the number of SWMUs, and the differences between the final and proposed corrective action rules, as impediments to the analysis of costs. He drew on EPA estimates that there are about 5,700 facilities subject to corrective action, of which 1,700 will require groundwater remediation and 2,000 soil remediation. He presented his estimates of the total, undiscounted costs of corrective action as follows (1990 dollars):

> With such great uncertainty about both the number of specific sites to be remediated and the likely per-site cost, it is obvious that any estimate of overall corrective action costs must be viewed cautiously. Nevertheless, on

[2] The National Survey of Hazardous Waste Treatment, Storage, Disposal and Recycling Facilities (TSDR) and the National Survey of Hazardous Waste Generators (GENSUR).

[3] According to ORNL, evidence in the databases they used suggests that they under report the universe of SWMUs by 20 to 40 percent; extrapolating to the larger universe yields a total cost of $290 billion.

[4] Bruce Tonn, Oak Ridge National Laboratory, letter to Gary Ballard, U.S. Environmental Protection Agency, September 9, 1991.

[5] Portney, Paul R., "The Economics of Hazardous Waste Regulation," in *U.S. Waste Management Policies: Impact on Economic Growth and Investment Strategies,* Washington, D.C.: American Council for Capital Formation, 1992.

the assumption that 3,000 facilities will require significant corrective actions at some of their SWMUs, and on the equally heroic assumption that cleanups at these facilities will cost $30 million each, the RCRA corrective action program may result in cumulative costs on the order of $90 billion.[6]

Comparison of Study Results

The table below summarizes the results of these various studies. The comparison shows the results of the revised RIA to be generally comparable to previous studies, given differences in assumptions, methodologies and scenarios evaluated. The revised RIA estimate of total costs is in the range presented in the RIA for the proposed rule. However, the proposed rule used a lower discount rate and addressed only groundwater costs. For comparison, the total costs in the current RIA at a 4 percent discount rate are projected to be about $29 billion, and the per-facility costs, $11 million.

ORNL's total costs are higher than the RIA's, though discount rates are the same. CMA's estimates are lower than the RIA's, but include costs only to the chemical industry. The revised RIA estimates costs to the chemical industry at $4.4 billion, but CMA's definition of the industry may include different SIC codes. Finally, the revised RIA's total cost estimate is lower than Portney's; however, his estimate is undiscounted.

Comparison of Revised Corrective Action RIA Results to Results of Other Studies

Study	Discounting	Total Cost (Billions)	Cost per Facility	Cost per SWMU (Millions)
Corrective Action RIA	7%	$19	$7.2	$1.1
Corrective Action RIA: Proposed Rule [1]	3%	$10-$67	$2.5-$110	Not estimated
Oak Ridge National Laboratory	7%	$89	Not estimated	[2] $6.4
Chemical Manufacturers Association	Rate not reported	[3] $6.6-$11	Not estimated	$0.35-$0.94
Paul Portney	None	$90	Not estimated	Not estimated

[1] Applies to groundwater remediation only.
[2] From undiscounted analysis.
[3] Applies to the chemical industry only (represents 25 percent of all facilities).

Revised Subpart S RIA Range of Per SWMU Present Value Remediation Cost by Unit [N = 15,000]

[In millions of 1992 dollars using 7% discount rate]

Unit Type	Minimum	Maximum	Weighted Average
Landfill	$0.0170	$39.00	$2.60
Surface Impoundment	$0.0090	$58.00	$1.20
Unspecified Unit	$0.0007	$13.00	$1.20
Spill Area	$0.0050	$20.00	$0.89
Tank	$0.0004	$2.70	$0.26
Accumulation Area	$0.0008	$3.50	$0.97
Process Sewer	$0.0480	$2.10	$1.20
Waste Pile	$0.0010	$3.20	$0.38
Land Treatment Unit	$0.0170	$7.30	$0.73
Injection Well	$0.6600	$0.66	$0.66
Incinerator	$0.0170	$6.00	$2.00
Area of Concern	$0.0020	$0.63	$0.13
Waste Transfer Station	$0.1300	$0.12	$0.13

Revised Subpart S RIA Total Present Value Remediation Cost

		4% Discount Rate	7% Discount Rate	10% Discount Rate
Total National Cost of	PV	$29 billion	$19 billion	$14 billion
Corrective Action	Annualized	$2.1 billion	$1.8 billion	$1.6 billion
Weighted Average	PV	$11 million	$7.2 million	$5.3 million
Cost Per Facility Remediated	Annualized	$0.8 million	$0.7 million	$0.6 million

[6] *Id.* at 9.

Mr. OXLEY. Thank you, Dr. Bone.
Mr. Parr.

STATEMENT OF MICHAEL S. PARR

Mr. PARR. Thank you, Mr. Chairman. My name is Michael Parr and I'm remediation program manager for the DuPont Company. My job is cleaning up hazardous waste sites and I appreciate the opportunity to testify today on the remedy selection provisions of your draft. I'd also like to thank you for the leadership that you've exhibited on this very important issue.

I'd like to open my remarks today by repeating a common theme; that is, we need Superfund reform, comprehensive Superfund reform, and we need it now. Today's program costs the public, businesses and the Government far too much, more than $10 million a day, and it delivers far too little in return. For every day Superfund is delayed, millions of dollars are wasted, sites go uncleaned, and potential health threats are left unaddressed.

Mr. Chairman, your draft plan is a much needed and welcome step in the right direction. It corrects many of the pervasive flaws in the current system, it gives reform effort a vital boost and keeps alive the hope that we may make Superfund reform a reality this year.

But before I offer DuPont's comments on the specifics of your plan, I want to call the subcommittee's attention to what may be the biggest threat to the Superfund program in its 14-year history. Today the Senate Finance Committee is marking up its massive budget reconciliation bill. Buried deep in this bill is a provision to extend the special taxes businesses pay to the Superfund program.

If that provision is passed by Congress and signed into law, the Superfund program will cease to exist as we know it, and any comprehensive reform passed by this subcommittee will be dead on arrival.

Now, I'm not a budget expert, but I do know that once those taxes are taken for budget reconciliation, they become unavailable to the Superfund program. Without those tax revenues, reform of the Superfund program becomes impossible under current budgetary rules.

We may not be able to stop the Senate from raiding the Superfund, but I urge every member of the subcommittee to call on your colleagues in Ways and Means to block this effort in conference. Tell them to keep the Superfund taxes available for the Superfund program.

I said a moment ago that the draft House Superfund reform plan moves in the right direction. Most importantly, it requires remedies that protect human health and the environment. It bases site-specific cleanup decisions on real risks to real people. It considers future land use in making cleanup decisions, and it eliminates the law's preferences language and most ARAR's. And it requires that these protective remedies are the most cost effective.

The draft plan gives the community a real voice in the decision process and capitalizes on the experience and expertise of the States. Finally, it permits a second look at flaws existing in remedy selection decisions.

Each of those provisions represents substantial improvement over current law. As many of the members of the subcommittee know, the groundwater provisions of last year's bill were the subject of some debate. Let me clearly say that DuPont considers the current language to be a major improvement over last year's bill. The groundwater language properly assures protective risk-based decisions for contaminated groundwater, it recognizes that we are not technically able to treat certain groundwater problems, and it assures that no one will drink contaminated groundwater.

However, we encourage the subcommittee to improve these provisions by incorporating an explicit provision for the protection of uncontaminated usable groundwater. Groundwater is a valuable national resource and we should protect it accordingly.

We also think that it's important for the subcommittee to clarify the cost test in the provisions. Cost is clearly an important component of remedy selection reform. The language in the draft is not entirely clear and it appears to offer several possible interpretations of how the cost test might be applied.

We would recommend the following test to the committee. Remedies must first be fully protective, they must balance relevant factors, and they must be the most cost-effective remedies that do so. We encourage you to clarify and simplify the language in the draft to meet this test.

Mr. Chairman, I've just provided a summary of DuPont's comments on the remedy selection title. More detail is available in our written statement. Let me close by saying that this proposal is a major step forward for Superfund reform. It can mean speedier cleanups of more sites, better and more certain protection of public health, and far better use of public and private resources.

DuPont shares this subcommittee's commitment to Superfund reform. We look forward to working with you, the subcommittee and other stakeholders on a bill that can reform Superfund and pass this year. I look forward to your questions. Thank you.

[The prepared statement of Michael S. Parr follows:]

PREPARED STATEMENT OF MICHAEL S. PARR, REMEDIATION PROGRAM MANAGER, DUPONT

I. INTRODUCTION

Good morning, Mr. Chairman and members of the Subcommittee. My name is Michael Parr. I am a Remediation Program Manager for the DuPont Company. DuPont is pleased to have this opportunity to testify on the Oct. 13 House discussion draft of "The Reform of Superfund Act of 1995" with particular focus on remedy selection and related issues. For my company, legislative reform of Superfund is a top priority. Remedy selection and liability/funding are our primary areas of concern. Remedy, however, is No. 1.

The problems which plague the Superfund program, and the need for comprehensive reform of the underlying statute, are well recognized. DuPont and other members of the business community appreciate your leadership, Mr. Chairman, and that of the subcommittee. We are pleased that this Congress is stepping up to the imperative of reforming this badly flawed program. We applaud EPA's efforts to make administrative improvements in the Superfund program, even as the Agency continues to acknowledge the need for comprehensive legislative reform. We are also aware of the concerns of some individuals and groups about portions of the House draft, and we pledge our best efforts to listen and to work with you to achieve satisfactory resolution of those common concerns. My company and many, many others do not want to see the Superfund program undermined. Neither do we want to continue the inefficiency and wasteful spending that characterize too much of today's pro-

gram. We also know that the Superfund program must become credible, the standards reliable, and our neighbors confident of Superfund actions.

To right what is wrong, House and Senate action is needed to transform Superfund into an efficient remediation program, employing smarter and more cost-effective solutions. Getting adequately funded, meaningful legislative reform signed by President Clinton as soon as possible is essential. Every month that goes by without Superfund reform means more flawed remedy decisions, more litigation resulting from an inequitable liability scheme, more controversy between the public and EPA, and more wasteful spending by both the government and private parties. Getting legislative reform of Superfuned signed into law will stop this endless nightmare and point us all in the right direction—specifically, towards achieving greater progress in protecting human health and the environment.

II. KEY PRINCIPLES OF REMEDY SELECTION REFORM

In May of this year, I testified on behalf of the Chemical Manufacturers Association before this subcommittee on the subject of remedy selection. In that testimony, I identified four key principles for remedy selection reform. They remain at the heart of DuPont's views regarding remedy selection reform. I'd like to reiterate these principles, and offer my perspective on how they relate to the October 13 House draft.

The first principle—Superfund remedies should be site specific and based upon plausible and realistic risk assessments that reflect the actual or planned future use of the land and water resources. Superfund, in other words, needs to focus on real risks to real people. *The second principle—existing provisions in the Superfund law which create artificial impediments to sound, site-specific risk-based decision making should be eliminated.* These provisions have served to inflate the cost and contentiousness of the program without corresponding contributions to protectiveness. Examples include the preferences for permanence and treatment and the use of ARAR's (applicable or relevant and apprpriate requirements.) *Third, the law should explicitly require that remedies be both protective of human health and the environment and cost-effective.* Without such a requirement, the program will continue to exhibit an almost perverse disregard for cost-effectiveness. *Finally, the fourth principle—Congress should carefully consider the roles of the States, the Federal government and the public in the Superfund process.* DuPont's experience is that when the local community has early and ongoing input into the remedy selection process, the result is almost always better decisions and faster cleanups. Clarifying State and Federal roles in the Superfund program should also do away with the current "two masters" syndrome where Superfund PRPs often must meet conflicting demands from State and Federal agencies.

III. THE PRINCIPLES AND REMEDY SELECTION (TITLE 1) IN THE DRAFT

At this point, I would like to offer comments on how, in DuPont's view, Title I of the House draft stacks up against these four remedy principles. Overall, the news is good. The October 13 draft language clearly moves in the right direction, especially when compared with beth current law and DuPont's experience at sites over the last 14 years.

Risk Assessment. On the risk assessment principle, the House draft proposes the basic building blocks for a sound, scientifically rigorous, successful program—remediation standards and remedy decisions based on real, not hypothetical, risks and remedies that are site-specific and reflective of actual or reasonably anticipated uses of land and water resources. The approach to making these future use determinations is balanced, requiring a range of factors and views to be considered. The local community is provided a much clearer picture of potential risks and greater opportunity to have a more prominent voice in remedy selection decisions.

Preferences and ARARs. On this principle, the October 13 draft language eliminates the artificial preferences for permanence and treatment and most ARARs, replacing them with a protective risk-based framework. This allows the full range of potential remedies to be applied while holding all remedies to strict standards of protectiveness.

Cost-Effectiveness. The draft sensibly sets forth the concept that the most cost-effective remedies that are fully protective should be selected by EPA. Some may think this is an academic point, since current law already calls for cost-effective remedies. However, in practice, Superfund operates in a way that essentially removes cost-effectiveness considerations from the program. If EPA's interpretation of Superfund is to change, Congress needs to send a new, strong, clear message on cost-effectiveness. The goal must not be to apply the cheapest remedy to any or all

sites. Rather, the goal, in our opinion, is to select those remedies that EPA believes will achieve the protectiveness needed, in the most cost-effective manner.

Roles of Communities, States. Finally, the principle on who does what in Superfund. Here, the draft language seeks to provide communities with access to and involvement in remedy selection decisions. The Technical Assistance Grant (TAG) program is expanded, and the draft also calls for Community Assistance Groups, thereby providing communities full access to information and an early and ongoing voice throughout the remedy process. DuPont also welcomes the proposed streamlining of the process for delegating elements of the program to the States, and for eliminating conflict and duplication between State and Federal programs. The States have tremendous knowledge and expertise that the Superfund program can and should capitalize upon.

Other elements in the draft language will serve to greatly enhance the remedy selection process. Expanding the emergency response provisions is one example. Another is inclusion of generic remedies, which can speed up remedy selection and construction for certain sites where the problems and solutions are similar. The provisions addressing hazardous substances easements are also good, providing a robust mechanism for ensuring that institutional and engineering controls are both recorded and maintained to track and ensure remedy effectiveness over time. Also important is the recognition of current technological limitations in remedy selection, while remaining open to (and in fact, encouraging) innovative technologies where appropriate. The ability to reopen unnecessarily costly remedy decisions provisions without unduly slowing cleanups, is also for avoiding wasteful expenditures at sites driven by decisions made under the old approach.

IV. SPECIFIC REMEDY SELECTION SUGGESTIONS

Mr. Chairman, most of DuPont's comments on the draft remedy selection provisions are positive. There are a few areas where DuPont has specific recommendations. These are:

- *Add new provisions regarding the protection of uncontaminated usable groundwater.* As a number of the subcommittee members will recall, one of the most problematic elements of last year's Superfund legislation was the highly complex requirements for groundwater remediation, which established a restoration goal for groundwater. The October 13 draft language clearly advances the ball by establishing a more risk-based approach for selecting remedies and incorporating considerations of land and water resource use.

DuPont believes that more is needed, in recognition of the fact the groundwater is an important national resource. We recommend addition of clear provisions addressing the protection of uncontaminated usable groundwater. Here the goal should be to achieve effective protection in a way that considers the nature and timing of the groundwater use, effectiveness and technical practicability.

- *Clarify the proposed cost test—what it is, what it isn't and how it works.* Critical to remedy selection reform, the cost test concept must be credible and clear. Unfortunately, there appear to be a range of possible interpretations of the cost test in the draft remedy selection provisions. Clarification, and possibly simplification, of the concept in the language and in the legislative history are essential.

DuPont's measure of an appropriate cost test is this: EPA first selects fully protective remedies, then adequately balances them against the remedy selection factors, and finally chooses the most cost effective options. We think this approach ensures, first and foremost, that all remedies are protective and address such issues as community acceptance and long term reliability, while also ensuring that remedies are cost effective.

- *Strengthen community involvement in the remedy selection decision.* As drafted now, there is a provision that the community's acceptance of the remedy is to be represented by an elected official of the local government in balancing remedial options. This appears to reduce the involvement of the Community Assistance Group. The language should be rewritten to clarify that the Agency should consider the view of all members of the local community.

V. OTHER PROVISIONS—RCRA (TITLE IX) AND VOLUNTARY CORRECTIVE ACTION/ BROWNFIELDS (TITLE III)

We are pleased to see that both the House and the Senate are taking steps to reform the significant impediments to remediation imposed by the current RCRA law. EPA is also actively working in this area. Reform of RCRA's regulation of reme-

diation wastes would provide a significant boost to protective, timely and cost effective Federal and State remedial programs across the country.

Finally, Mr. Chairman, we are encouraged that the October 13 draft language provides incentives to achieve the goals of the Superfund program by encouraging voluntary action. Those who step forward to undertake responsible voluntary action expect, and should obtain, assurances that they can reach closure at sites. To encourage re-use of stagnant sites, or "brownfields", developers also need assurances that they will not be subject to perpetual liabilities as a result of undertaking a meaningful voluntary action that promises new life and jobs for a community.

VI. CONCLUSION

In closing, Mr. Chairman, making Superfund a workable program will require comprehensive reform that includes provisions on the Superfund liability system and the funding mechanism, in addition to remedy selection, RCRA and voluntary cleanups. From DuPont's perspective, the remedy selection provisions in the House draft measure, if enacted, would mean speedier cleanup of more sites, greater and more certain protection of public health, and far better use of public and private resources. Our recommendation for improvements in the draft language are based on our 14 years of experience with the Superfund law. We believe our proposals reinforce what is needed to make the Superfund program work, to make site cleanup credible, and to provide more opportunity for the PRPs, the communities the States and the Federal government to make real environmental progress.

We at DuPont commend this subcommittee for holding this hearing to advance solutions to Superfund's fundamental problems. My company stands ready to continue to work with this subcommittee and its staff to make real Superfund reform a reality. Thank you, Mr. Chairman. I will be pleased to take any questions.

Mr. OXLEY. Thank you.

Our next witness didn't get a proper introduction. Mr. Doug MacMillan, executive director for the Environmental Technology Council here in Washington. Mr. MacMillan, welcome.

STATEMENT OF DOUGLAS MACMILLAN

Mr. MACMILLAN. Thank you. The council is comprised of companies engaged in commercial off-site recycling, treatment and disposal of hazardous and industrial wastes and in the on-site cleanup of Superfund and RCRA corrective action sites.

Our members have a dual perspective on Superfund, both as providers of off-site and on-site cleanup services and, on occasion, as identified Superfund PRP's, based on our disposal in third party sites of waste and waste treatment residues. We think this dual perspective provides us some insights on what the real world implications of some of the provisions of the proposed bill are.

Like other groups familiar with Superfund, we recognize the need to expedite site cleanups, reduce cleanup costs, and reduce the percentage of cleanup resources going to litigation and inconclusive studies. The council supports varying cleanup standards based on projected future land use and applauds steps to limit liability based on de minimis disposal or past disposal in co-disposal landfills.

We are seriously concerned, however, that some of the draft's current provisions would actually increase site cleanup litigation, block or slow many on-going cleanups, and leave private parties and Government regulators often without protective, dependable or defensible site cleanup standards.

Moreover, we fear that introducing the Resource Conservation and Recovery Act in the Superfund legislation threatens to open the floodgates for piecemeal amendment of the complex RCRA stat-

ute and further complicates an already complicated Superfund legislative process.

On the litigation front, we are particularly surprised by and concerned about provisions that would allow any "person with a substantial interest" to legally challenge a final Government-approved cleanup plan where the remedial action is already underway but is not yet completed. The definition of "completed," of course, includes completion of post-construction, operation and maintenance, which can go on for many years.

Additionally, this would require the regulators to modify the original plan if fairly ill defined realistic and significant, quote-unquote, risks were avoided and there would be a projected cleanup savings of $1 million. These provisions, in our opinion, would create serious increase in litigation and could stop cleanup actions all over the country.

Relative to your questions of the State witnesses, I think given a 10 to the minus 4 to 10 to the minus 6 risk range, which is several orders of magnitude, given the fact that there's some lack of clarity about realistic and significant risk and the factor that a site-specific risk assessment is inherently variable, I think it would be awfully easy to convince a judge that someone petitioning to challenge a record of decision had a chance of prevailing on the merits. So I do think it would block cleanups.

I guess even more important, perhaps, it would require people to go back and review thousands of past decisions made in the Superfund area. We think it's probably more important to get people to focus on bringing the new philosophy and new standards to bear on new problems, new issues than to go back and try to do that.

The other question is that we are concerned about the lack of what we think are reliable and in all cases protective remedy selection processes. Our group has extensive experience in site-specific risk assessment, and we're convinced that the current draft goes somewhat too far in its reliance on site-specific risk assessment.

Again, our experience indicates that the risk assessment process is still unfortunately inherently subjective and malleable, and despite the best efforts of the draft's authors to begin the standardization of risk assessment, and there are real efforts in the bill to do that, there's still a host of unanswered policy and technical questions about risk assessment which are referred to in our longer statement.

In our view, frankly, it may be a number of years before a reasonably standardized and nonsubjective site-specific risk assessment is possible. Because of that fact, we continue to believe that while site-specific risk assessment is a useful tool, it needs to be buttressed by some kind of minimum site cleanup standards targeting only the most highly concentrated and dangerous cleanup waste; the hot spot waste.

Last year's Consensus Report of the National Commission on Superfund and RCRA Federal Advisory Committee addressed this problem by proposing the hot spot concept, which would give on-scene site cleanup directors very broad discretion to waive existing procedural and substantive standards. The one exception to this

broad discretion was the retention of certain minimum handling standards for the most highly contaminated hot spot waste.

We think this approach gives extensive flexibility while protecting communities against that relatively small percentage of highly contaminated waste which really requires proper management.

Finally, we're concerned about remedy selection. Again, we would agree that while you, one, cannot demand permanence in treatment in all cases, we think it does make sense to require those provisions, to the degree possible, in Superfund cleanup remedies.

Finally, we again question the wisdom of introducing RCRA amendments into the Superfund process. There's been a multi-year on-going Federal advisory committee process on this very issue. EPA and the States are about to issue a proposal this year that would do all of the things that are proposed to be done in the subtitle IX. The only exception is that this would retain the hot spot concept for site cleanups. As previously stated, we think the hot spot concept should be retained, both for Superfund and for RCRA. Thank you.

[The prepared statement of Douglas MacMillan follows:]

PREPARED STATEMENT OF DOUGLAS MACMILLAN, EXECUTIVE DIRECTOR, ENVIRONMENTAL TECHNOLOGY COUNCIL

I. INTRODUCTION

My name is Doug MacMillan. I am the Executive Director of the Environmental Technology Council (ETC). The Council is a national association of companies that provide facilities and services for the recycling, treatment, and secure disposal of industrial and hazardous waste. Additionally, some of our member companies provide cleanup services at contaminated properties like Superfund and RCRA corrective action sites.

As companies in the environmental services business, our members have viewed Superfund from a number of perspectives. On occasion, member companies have been identified as "potentially responsible parties" (PRPs) under the Suporfund statute based on their off-site disposal of waste and waste treatment residues. In other instances, our members are retained to conduct site cleanups or to treat or dispose of site cleanup wastes. We believe that these multiple roles give us a unique perspective regarding the strengths and weaknesses of the current Superfund statute and the potential real-world effect of some of the draft's proposed Superfund reforms.

Everyone recognizes that the current Superfund program is in need of significant reform, and the Council supports efforts to expedite site cleanups, reduce total Superfund site cleanup costs, and minimize the percentage of cleanup resources spent on inconclusive studies and endless litigation. For example, we support provisions of the draft Superfund Reform Act that would vary site cleanup levels based on reasonably anticipated future land use and limit the liability of parties for past disposal in municipal solid waste landfills or for disposal of "de minimis" volumes of hazardous material.

However, despite our positive reaction to certain provisions of the current discussion draft, we are concerned that some of the draft's provisions would actually increase litigation, block on-going site cleanups, and leave private parties and government regulators without protective, dependable, or defensible site cleanup standards. Additionally, we question whether it makes sense to attempt piecemeal amendments of the Resource Conservation and Recovery Act (RCRA) through the proposed Superfund Reform Act. Our primary concerns are outlined below.

II. INCREASED LITIGATION/FURTHER DELAYS IN SITE CLEANUPS

The October 12 draft would authorize parties responsible for site cleanups to go to Court and challenge government-approved site cleanup plans *before* the plan is implemented. This means that years of technical studies concerning individual sites will often be followed by years of litigation—further delaying an already agonizingly slow cleanup process. These cleanup plans would be subject to challenge by both persons who think the cleanup requirements are too stringent and by those who feel

the cleanup plans are inadequately protective. One troubling scenario is a site involving a large number of PRPs where a single dissenter may be able to block needed cleanup action.

To help insure timely cleanups, Superfund currently prohibits *up-front* legal challenges to government cleanup plans. Responsible parties have the option of implementing the government plan and suing later to show that costs were unreasonable—or of refusing to implement the cleanup and defending against any subsequent "cost recovery" action.

While the current approach is admittedly not perfect, we do not believe that local communities should be "held hostage" and forced to live with a contaminated site while up-front multi-year litigation drags on. We believe the current prohibition on "up-front" challenges to site cleanup plans should be retained.

We are also very concerned about provisions of the current discussion draft which would allow responsible parties to legally challenge *final* government-approved cleanup plans where the planned remedial action is already underway but has not yet been *"completed"* (including the "completion" of post-construction operations and maintenance—which can go on for years after actual construction removal, and material treatment or containment activities have been completed).

Under these provisions, any "person with a substantial interest" can petition the President to review a final published record of decision, and the President would be *required* to select an alternative plan and modify the original record of decision if an alternative remedy would protect against "realistic and significant risks" and result in cleanup savings of at least $1,000,000.

From our perspective, authorizing pre-implementation challenges to Government-approved cleanup plans and encouraging the reopening of ongoing cleanup remedies would drastically undercut the Superfund reform goal of minimizing site cleanup litigation and associated transaction costs. Who is eligible to file a judicial challenge to a government-approved cleanup plan before it is implemented? What happens if the majority of PRPs support a plan but one PRP does not? How do you define protection against "realistic and significant risks" which would support the reassessment of on-going cleanup plans and the selection of alternative remedies? At one point we believed that Superfund reform would result in a loss of business for attorneys practicing in this area and a resulting drop in legal and transaction costs. However, if these provisions are retained, we believe there will be a significant *increase* in percentage of overall site cleanup costs devoted to legal wrangling.

These new avenues of legal challenge would dramatically increase legal costs, throw most of the Superfund cleanup decisions made thus far into doubt, stop ongoing cleanup actions all over the country, and bog down state and Federal officials in revisiting past technical decisions—rather than allowing them to bring new standards and philosophy to bear on future decisions.

III. LACK OF PREDICTABLE AND DEFENSIBLE CLEANUP STANDARDS

We agree that cleanup standards should vary depending on projected land use, that cleanups should address "real world" threats, and that site-specific risk assessments should play a significant role in determining the appropriate cleanup remedy.

We are convinced, however, that the October 12 draft goes too far in its *total reliance on potentially subjective site-specific risk assessments and its total elimination of any preference for "treatment" and "permanence"—even for the most highly contaminated "hot spot" wastes.*

A. Elimination of Any Preference for Waste Detoxification or Permanent Remedies

Under the draft bill, all site cleanup approaches are deemed to be "equal". Decision-makers have the option of actually detoxifying and immobilizing site cleanup wastes, allowing "natural attenuation", or authorizing "institutional controls" (a.k.a. chain-link fences). *Under this approach, many site responses will consist of little more than putting up a fence and distributing bottled water.*

This approaches gives no emphasis to cleaning up sites so they can be safely returned to productive use and potentially creates "dead zones" in communities. It continues the threat that "contained" or "controlled" contamination will ultimately be released and create additional contamination problems.

While we agree that it makes little sense to demand waste detoxification or permanent immobilization in situations where technology may be inadequate or the real world risks may be minimal, continuation of some sort of *preference* for detoxification/permanent immobilization (which may be overridden by technical or risk factors) makes long-term environmental and economic sense. *All site cleanup approaches are not "equal"*—and it makes little sense to ignore these critical distinctions.

B. Risk Assessment

Unfortunately, given the current "state of the art", many risk assessments are still highly subjective and extremely "malleable." A person commissioning a site-specific risk assessment can often, consciously or unconsciously, pre-determine the result through their selection of contractors, emphasis on particular exposure pathways, or choices between often contradictory "scientific assumptions" which arise in almost all risk assessments. *The draft Superfund reform bill, which outlines certain basic risk assessment principles, and calls for the development of additional Agency guidance, does not begin to overcome the inherent subjectivity of the site-specific risk assessment process.* (In fact, it may be a number of years before truly "non-subjective" risk assessments are possible.)

As an example, the October 12 Superfund reform draft continues to pose many critical risk assessment problems and questions—*despite* the obvious efforts of the drafters to reduce the subjectivity of the risk assessment process. These range from basic risk assessment/remedy selection issues which underlie the draft's General Standards in Section 121(b)—the lack of a clear definition for "realistic' and "significant" risks which the remedy should protect against—to unanswered questions about specific technical provisions. Unanswered technical questions include: 1) Why it makes sense to look at ecosystem protection in terms of the sustainability of "significant ecosystems"—when science currently only has the tools to adequately assess "populations" or aggregations of populations rather than total systems?; 2) Is it appropriate to base risk assessment only on the 90th percentile of exposure probability distribution? Are we adequately protecting the potentially more vulnerable 10% of the population outside this distribution?; 3) Is it possible to focus on *actual* site-specific ingestion or inhalation of hazardous constituents when there are very few generally accepted protocols for conducting the field work necessary to support this analysis?

For these reasons, we believe that site-specific *risk assessment can be a useful tool, but needs to be buttressed by some sort of minimum waste-handling requirements for the most highly contaminated site cleanup wastes ("hot spot" wastes).*

Last year's "Consensus Report of the National Commission on Superfund" and the consensus recommendations of EPA's Federal Advisory Committee on RCRA Cleanup Wastes *proposed elimination of most procedural and substantive cleanup standards for Superfund wastes and RCRA site cleanup wastes—granting broad discretion to regulatory officials overseeing a particular cleanup. The one exception to this discretion was in the handling of the most-highly contaminated ("hot spot") wastes.* For this waste (generally estimated to be 20 percent or less of all site cleanup wastes) *certain minimum handling or treatment requirements were retained.*

We *strongly recommend some sort of "hot spot" approach be retained* for Superfund cleanups. Site specific risk assessments are simply still too subjective to be the sole determinant of whether or not a particular waste represents a "hazard". Requiring minimum standards for the highest concentration of wastes still grants extensive flexibility to site cleanup officials but *discourages inadequate "penny wise" site cleanups which often simply defer and exacerbate longer-term environmental and economic impacts—and provides a "minimum standard" which responsible parties or government officials can use to shield themselves against local pressure to engage in cleanup "overkill"* at politically sensitive sites.

IV. PROPOSED AMENDMENTS CONCERNING RCRA CLEANUP

The Superfund reform draft would amend the Resource Conservation and Recovery Act (RCRA) to exclude "remediation wastes" from most RCRA Subtitle C requirements.

While it makes sense to simplify and expedite RCRA cleanups, *this process is already well underway. EPA and a number of participating states are currently drafting a rule (after a two year multi-stakeholder "Federal Advisory Committee" process) which would eliminate normal RCRA permitting requirements, land disposal restrictions, and minimum technology requirements as they apply to RCRA cleanup wastes.* The draft rule is anticipated in December 1995.

The *primary difference between the October 12 draft and the evolving EPA/state rule is that the EPA/state rule will propose the "hot spot" approach* generally supported in last year's consensus Superfund recommendations. Under this approach, minimum standards would be applied only to the relatively small percentage of cleanup wastes that exceeded risk-based "hot spot" levels.

We are convinced that the hot spot approach is the best overall economic and environmental approach *both* for Superfund *and* for RCRA. (The rationale is even stronger under RCRA, which is a relatively stringent "preventative" statute de-

signed to encourage safe waste handling in the first instance—rather than an after-the-fact "cleanup" statute.)

Not only is the current proposal on RCRA cleanups unnecessary, but it potentially *opens up the complex RCRA statute to a host of other amendments.* We question whether Congressional authorizing committees should begin a piecemeal process on RCRA amendments and are not convinced that a "one size fits all" approach to the two statutes is appropriate, given the different functions the two pieces of legislation are designed to fulfill.

Other major problems with the proposed RCRA amendment include: 1) a definition of site cleanup or "remediation" waste that is so open-ended that it would permit routinely generated "process wastes" to escape normal environmental controls and be handled under significantly less protective "site cleanup" standards; and 2) a state authorization process which grants *immediate* interim authorization to manage this program—even for states with very limited resources or experience in this area.

We recommend that this RCRA provision be dropped from consideration as part of the Superfund reauthorization. This issue is already on its way to being resolved, and inclusion of RCRA provisions (even if they were well-founded) threatens to complicate an already daunting Superfund process.

V. CONCLUSION

We urge you to consider these issues and to support provisions which would avoid additional litigation delays, establish minimum standards for the highest-concentration wastes, and encourage the use of reasonable cleanup remedies that detoxify or permanently immobilize high concentrations of potentially dangerous materials.

Mr. OXLEY. Thank you, Mr. MacMillan.

The final witness, Miss Smith.

STATEMENT OF VELMA M. SMITH

Ms. SMITH. Thank you, Mr. Chairman. First I should say I appreciate the seat at the table, knowing that you fully expected to not hear a very happy view of this bill from this witness.

And let me cut right to the chase. Friends of the Earth finds the draft Superfund Reform bill, with its changes in liability, its cap on adding new sites to the NPL, its restrictions on payment for natural resource damage, its constraints on the issuance of administrative orders, as well as its sweeping changes in remedy selection, to yield a sorry retreat on the national commitment to communities scarred by pollution.

Under ROSA, we pay polluters and let the taxpayer pick up the tab for corporations that have made poor decisions about chemical management in the past. Will these polluter payments buy speed in cleanups? No. By introducing a variety of new, ill-defined terms, by requiring risk assessments in every case, even before emergency removals, by forcing EPA to revisit hundreds of Superfund decisions and by lifting the current bar on pre-cleanup litigation, this bill maximizes transaction costs and slows cleanups.

This lawyers and accountants first, bulldozers later approach just doesn't square with the rhetoric we have heard from Congress on the need to get this program moving faster. But for now I set these problems aside because they're overshadowed by other problems. The sweeping changes your bill makes to remedy selection have the ability to render much of the liability debate meaningless.

Try as I might, Mr. Chairman, I cannot read your approach to cleanup to offer more than fences and filters on the tap. ROSA abandons the notion of restoration, not just when scientific and technological complexities make restoration unachievable, not just

when the pay-out of cleanup costs associated with one site would imperil cleanup elsewhere, but in each and every case.

Your bill removes the imperative to restore to a community the beneficial uses of land, water and air. It places the rights of the polluter, the right to a cheap cleanup prescription, above the rights of an affected community. The driving policy can be characterized as "Use it or lose it," for the burden falls not on the polluter to show why cleanup cannot or should not occur but on the affected community to show what uses they have made of resources or what uses they will make.

The message to the community: "If you want clean land and water, stake a claim and be prepared to defend it."

How do we reach these harsh conclusions? By looking at what you have stricken from existing law and what you have rejected in terms of last year's painfully wrought compromises. You have stricken the requirement to, at a minimum, protect human health and the environment and replaced this with a standard that calls for protection against realistic and significant risk.

To this new standard you have also appended a new requirement entitled "Certification of Cost-Effectiveness" but reading as a cost-benefit balancing test. We agree that once cleanup goals are chosen, cost-effective means of achieving those goals should be selected. We do not agree, however, that we should answer the question, "How clean is clean?" with the question, "How cheap is it?"

You have also deleted the requirement for remedies to achieve compliance with other Federal environmental laws and more stringent State standards, save the State standards on point source discharges. With this deletion, you effectively delete the requirement to clean up or even to control or contain groundwater contamination. You have deleted the law's current preference for permanent treatment and, for the first time, you have specifically placed natural attenuation, institutional controls, point of use treatment and provision of alternate water supplies on par with treatment.

This does not, as it has been argued, simply restore balance and flexibility. Coupled with the overriding cost test and the new mandate to calculate costs and benefits using net present values, you will instead drive the decision in virtually every case to the cheap, up-front or fences and bottled water option.

You have also restricted the President's authority to require remedies that restore more than current uses of resources. And, in so doing, you embroil the Federal Government in sensitive issues of local land and water use. You have placed an onerous and in some cases impossible burden on affected individuals and communities to show substantial probability of any different use occurring in the future. Even when such a case can be made, you do not require that that use be accommodated.

Finally, your language on risk assessment, with its repeated references to most plausible assumptions and its requirement to set protective exposure levels at the 90th percentile does far more than rein in the most extreme of hypothetical exposure scenarios. Remember, after all, that under your bill, hypothetical land and water use scenarios are not even under consideration. Your bill not only fails to protect people who have disproportionately high exposures

or special sensitivities but it also unduly limits the discretion that the Agency has to protect these people.

Overall, we believe your new "superfence" approach is wrong, not only because it is not fair but also because ultimately it will not work. Superfund sites should stand as ample reminder of the foolish optimism we have had in the past about our ability to manage toxic wastes, to let them into the environment but keep them in their place.

Your bill is a recipe for unfairness, for delay, for slipshod cleanups, for ever-expanding dead zones in Superfund communities. Mr. Chairman, I urge you to step back, to rewrite. Thank you.

[The prepared statement of Velma M. Smith follows:]

PREPARED STATEMENT OF VELMA M. SMITH, FRIENDS OF THE EARTH

Good morning. Mr. Chairman, Members of the Committee, I am Velma Smith, Executive Director of Friends of the Earth. Friends of the Earth is a national nonprofit organization that works—in concert with affiliates in over 50 countries across the globe—on energy and environmental issues. On behalf of Friends of the Earth, I thank you for this opportunity to share our views on the Chairman's proposed package for Superfund reform.

In the short time available this morning, I will concentrate primarily on issues of remedy selection—not because Friends of the Earth believes that remedy selection is the only part of the proposed bill which falls short on sound public policy. On the contrary, overall we find the bill—with its changes in liability, its cap on adding new sites to the National Priority List, its restrictions on payment for natural resource damages, its constraints on the Environmental Protection Agency's ability to issue administrative orders, as well as its sweeping changes to remedy selection—to yield a sorry retreat on the national commitment to communities scarred by pollution.

With its polluter rebate or "kickback" as my colleagues are calling it, this bill turns the concept of "polluter pays" on its head. Issues of national debt and taxpayer equity, it would appear, went out the window when Title II, was drafted. This proposal pays polluters and lets the taxpayer pick up the tab for corporations that made poor decisions about chemical management in the past and have spent the last decade and a half working to rid themselves of their responsibility to the public for those mistakes.

But given the program's history, couldn't we swallow a model dose more of corporate welfare, if that would net an improved pace of cleanup? Perhaps.

But under this bill polluter payments do not translate into faster or better cleanups. Again, to the contrary, this bill maximizes transaction costs; it slows down if not stops meaningful cleanups altogether; it invites a rush to courthouse, virtually guaranteeing more litigation **before** cleanups are completed or even initiated. It does these things not only by introducing a variety of new, ill-defined terms, such as "actual and significant risk" and "substantial probability" of a "reasonably anticipated" land or water use, but also by requiring risk assessments before emergency removals, by forcing EPA to revisit hundreds of Superfund decisions and by lifting the current precleanup bar on litigation.

This lawyers and accountants first, bulldozers later approach, Mr. Chairman, just doesn't square with rhetoric we have heard from Congress on the need to get this program moving faster.

But for this morning, I set the detail of those problems aside—not because they do not matter, but because they are overshadowed by other problems. The sweeping changes your bill makes to remedy selection, in my view, have the ability to render much of the liability debate meaningless. Who pays matters far less under your bill, because what must be paid for becomes, for the most part, trivial. Try as I might, Mr. Chairman, I cannot read your approach to cleanup to offer more than fences and filters on the tap.

Your program abandons the notion of restoration—not just when scientific and technical complexities make restoration unachievable, not just when the payout of cleanup costs associated with one site would imperil the cleanup elsewhere—but in each and every case. Your bill removes any imperative to restore to a community the beneficial uses of land, water and air. In fact, Mr. Chairman, we read your bill to place the "rights" of the polluter—the right to a cheap cleanup prescription—above the "rights" of the affected community.

Under Title I and under the Title dealing with natural resource damages, the driving policy can be characterized as "use it or lose it," for the burden falls not on the polluter to show why cleanup cannot or should not occur but on the affected community to show what uses they have made of resources or what uses they will likely make. The message to the community—indeed any community that hosts an industrial or waste management facility: If you want clean land and water, stake a claim and be prepared to defend it.

Those are harsh pronouncements on a bill that has been described by your staff as restoring balance. How can we reach these conclusions? We do so not simply by reading the language of your bill but also by looking at what you have stricken from existing land and what you have rejected in terms of last year's painfully wrought compromises. Viewed in this context, there can be no other but this harsh interpretation.

In redrafting this section, you have stricken the current law's requirement to "at a minimum" protect human health and the environment. You have replaced this with a standard that calls for protection against "realistic and significant risks," and to this new standard you have also appended a new requirement that is entitled "certification of cost-effectiveness" but, in fact, reads as a cost-benefit balancing test. We agree that once cleanup goals are chosen, cost-effective means of achieving those goals should be selected. We do not agree, however that the setting of cleanup goals should, from the start, be primarily a question of costs. We should not—as we believe you have—answer the question "How Clean is Clean?" with the question "How cheap is it?"

You have also deleted the law's requirement for remedies to achieve compliance with other federal environmental laws and with more stringent promulgated state standards or limitations. With this deletion, you have deleted the requirement to clean up or even to control groundwater contamination, keeping it from spreading to uncontaminated areas. For this you have substituted a requirement to prevent or eliminate "ingestion" of drinking water in exceedance of Safe Drinking Water Act standards. And, in the most recent draft we have seen, you have selectively inserted this requirement for point source discharges to comply with state Clean Water standards.

You have deleted the law's current "preference" for permanent treatment, and you have deleted the requirement for the President to assess permanent solutions and consider long-term uncertainties of land disposal as well as the potential for future remedial costs if remedies fail. And for the first time, you have specifically placed "natural attenuation, institutional controls, point of use treatment and provision of alternate water supplies" on par with treatment. Coupled with the overriding cost test and the new mandate to calculate costs and benefits using net present values, you will drive the decision in virtually every case to the "cheap up front" or fences and bottled water option. You will also, in my view, destroy the incentives behind the valuable and impressive progress and innovations that have been made in the arena of groundwater science and groundwater cleanup.

In the provision on the use of land, water and other resources, you have actually restricted the President's authority to require remedies that restore more than current uses of resources and in so doing you embroil the federal government in sensitive issues of local land and water use. You have placed an onerous—and in some cases likely impossible—burden on affected individuals and communities to show "substantial probability" of any different use occurring in the future. Even when such a case can be made on the administrative record, you do not require that that use be accommodated.

You have deleted the current law's requirement for a five-year review of remedies which leave pollutants on site, though clearly those options will be chosen far more often under your reform package. What's more, your provisions on liability release press the government to provide settlements with covenants not to sue before response actions are completed and certainly before a solid performance record can be firmly established. We believe that these provisions assure iron-clad relief for tin-plated remedies and will inevitably saddle the American taxpayers with the real long-term costs of pollution cleanup.

Finally, your new language on risk assessment—with its related references to "most plausible" assumptions and its requirement to set protective exposure levels at the 90th percentile of exposures does far more than rein in the most extreme of hypothetical exposure scenarios. Your bill not only fails to protect people who have disproportionately high exposures or special sensitivities but also unduly limits the discretion that the Agency has to protect these most at-risk people.

Overall, Mr. Chairman, we believe your new "Superfence" approach is wrong, not only because it is not fair but also because—ultimately it will not work. Many, if not all, Superfund sites should stand as ample reminder of the foolish and un-

founded optimism we've had in the past about our ability to "manage" toxic wastes, to let them into the environment but keep them in their place, to control their fate after release to the lagoon or disposal in the landfill. Under your bill we don't learn from those mistakes, we repeat them, this time placing faith and trust in fences.

Ironically, your bill which will clearly stifle development and innovation in groundwater science and groundwater cleanup technology, seems to be based on a deep but unrealistic faith in the infallibility of today's technology, solid trust in tomorrow's institutional memory and control, an unyielding certainty of the exactitude of models for fate and transport of contaminants, and a stubborn belief that what we today understand about the frailties of human health is all that we will need to know or at least all that is important.

Mr. Chairman, I don't begrudge you all measure of that. But, Mr. Chairman, a national cleanup policy based squarely on those optimisms and little more will not work. Your bill is a recipe for unfairness, for delay, for slipshod cleanups, for ever-expanding dead zones in Superfund communities and for keeping the nation revisiting and repairing sites that should and could be cleaned up and restored to beneficial use. Mr. Chairman, I urge you to step back, to rewrite. The rewrite need not take forever—you have last year's compromises to work from. We urge you to do so.

Thank you. Again, I appreciate this opportunity to share the views of Friends of the Earth and I look forward to your questions.

Mr. OXLEY. Thank you. I'd like to ask you two gentlemen, Dr. Bone and Mr. Parr, who have actually been involved in cleanups, to respond to some of the sound bites we heard from the most recent witness.

Mr. PARR. Mr. Chairman, one thing that I am fully confident is that the draft language ensures protection of human health and the environment. I cannot read in there fences and bottled water. I read that you do what you have to do to ensure protection of both human health and the environment, to do that in a way that is effective, that has long-term reliability and gives the community a full voice in the process.

I understand the concerns of those who feel that losing standards such as mandatory treatment, preferences for ARAR's and whatnot, are downgrading. Frankly, they're simply the sorts of common sense reforms we need to get this program focussed on cleanup.

Mr. BONE. I guess my perspective goes something like this. I am not a lawyer. I'm not a politician. I don't know what's the best way to word this. I think the bill accomplishes the very thing that's needed.

When I work this day to day, I have arrived at the absolute conclusion that we have to make these decisions on a site-specific basis. There are too many things that are variable, and that has to be based on the waste and on the site.

Furthermore, those decisions ought to be lowered to the States, to the local communities, the people that really understand what's going on at that site, and remove the artificial constraints that are in the present bill.

I might quote a site that we've recently had a ROD overturned in Ohio. The EPA issued a ROD that called for on-site incineration and excavation of the waste even though the community was protesting at the time that they did not want that to happen. The ROD was issued anyway. The community outcry became so great that the ROD has now had to be reissued with a much more common sense remedy, doing the right thing.

Even the people writing the ROD at the time admitted, "This really isn't the right thing to do but we're required because of permanence in treatment."

Those are the kinds of things I would like to see cleared out of the way so that we can make good, common sense decisions on a site-specific basis.

Mr. OXLEY. Mr. Mattia?

Mr. MATTIA. Mr. Chairman, although I'm a vice president, that doesn't mean I didn't roll up my sleeves for 30 years. I've been involved in Superfund since its inception and handled hundreds of sites.

One of the issues, and I'll cite an Ohio issue in similar fashion, we spent several hundreds of thousands of dollars to develop a counter to an EPA proposed ROD in an Ohio site that, once reviewed for the 50th time by the Agency, some clarity and sanity developed within the Agency and we transformed a $15–$17 million remedy to a $6 million remedy with all of the same protections to health and the environment.

And the same issue that Dr. Bone just described about the Agency saying that, "We're constrained by our requirements under the current law to change and to move forward" is what we hear continually to eliminate or avoid sanity and reasonableness and good science in developing these remedies.

Mr. MACMILLAN. Mr. Chairman, may I offer one quick point?

Mr. OXLEY. Mr. MacMillan.

Mr. MACMILLAN. Like these gentlemen, we've been involved in a variety of site cleanup actions, as well, and we believe that if site-specific risk assessments were really well based, scientifically based in every instance, they would obviously be the thing that one would want to use.

We tend to believe that they are, from long experience, an evolving art almost, rather than a science. They're very malleable. They are subjective. They are a good process to use to help guide your decisions but we think right now you really cannot base your decisions solely on that. You need that safety net which is, we think, a minimum technology standard for the most highly contaminated waste.

That protects not only the communities against penny wise-pound foolish cleanups; it also protects the PRP's from goldplating in situations where a local community may be politically powerful and try to force the PRP or force the State to take the cleanup to excessive lengths.

If you have a minimum standard you can say, "Hey, I exceed that standard. Let's get on with the cleanup."

Mr. OXLEY. Ms. Smith, did Friends of the Earth support the original Superfund bill in 1980?

Ms. SMITH. I wasn't with Friends of the Earth at the time. I believe so.

Mr. OXLEY. And did they support the reauthorization in 1986?

Ms. SMITH. Yes, sir.

Mr. OXLEY. Are you happy with the current status of Superfund?

Ms. SMITH. No, sir, in terms of the pace of cleanup. In terms of it working as an incentive for better management of waste and in terms of it being an incentive to clean up at sites that haven't scored, yes. In terms of the pace of cleanup, no, and that's why, in the last session, we devoted enormous resources and enormous amounts of time, for a small organization, to be involved, to sit in

rooms with folks like these for days on end to try to reach compromises to deal with the problematic pieces of the implementation of existing law.

Mr. OXLEY. I was involved obviously in those discussions. Don't you think that the current scheme, as you indicated, literally slows down cleanup and that the current regime has to be changed so we can get to quicker and better cleanup? Isn't that the goal that we all share?

Ms. SMITH. Quicker and better cleanup is a goal we definitely share. I don't believe that the current scheme slows down cleanup.

Mr. OXLEY. You don't?

Ms. SMITH. I think the reality is——

Mr. OXLEY. What about the litigation?

Ms. SMITH. I think in some cases that the litigation that's talked about the most is the litigation between the PRP's and their insurers, and that litigation does not necessarily slow down cleanup because cleanup decisions can go forward and people can fight that out in court.

The current system, I think we've all made a mistake in thinking that these cleanups could happen fast. And I think at many of these sites, cleanup, no matter what kind of program you were running, whether it was a public works program without liability questions at all, cleanup would take a very long time because some of these are very complex, very, very polluted sites.

Mr. OXLEY. The gentleman from Oregon.

Mr. WYDEN. Thank you very much, Mr. Chairman.

A question for you, Mr. Parr and Dr. Bone. In October 1994, your companies, DuPont and Dow, joined scores and scores of other companies in writing a letter to all of us on the subcommittee stating your strong support for last year's Superfund bill and you opposed in that letter amending the bill with additional obligations to conduct cost-benefit analysis or risk assessment.

Does the ROSA bill contain the same risk and cost-benefit provisions as last year's bill?

Mr. PARR. I think that in large measure, the current draft incorporates all of the strong elements of last year's bill. I think it does so in a positive way by simplifying and clarifying quite a few of the rather complicated provisions that were in last year's bill.

For example, I think the risk guidelines in the current draft set up a clear, scientifically rigorous and transparent approach to doing risk assessment that we fully support.

As regards cost-benefit, I laid out for you, I think, a test that we are quite comfortable with that achieves both robust cleanups and in a very cost-effective manner. I think it's quite possible to use a cost-benefit test as an adjunct to that and to build from that, but I'm also quite comfortable that the test I laid out for you is a very robust one.

Mr. WYDEN. Would your colleague like to add anything?

Mr. BONE. I think not. I think we are a little, I must admit, a little confused by how the cost test would actually work in the bill. I think it works. I think it works fine, but we would also support what Michael suggested earlier may be a little more simplified approach.

Mr. WYDEN. The language is very specific in the 1994 letter. It says, "We oppose amending this bill with additional obligations to provide cost-benefit analysis." It just looks to me like any way you cut it, there are additional obligations in this bill. I know in TV commercials they always say people are flip-flopping when we do things like this but I'm interested in having a more substantive kind of answer as to why the change.

You know, a lot of us felt that last year's bill reflected some very good work by industry and some very good work by environmental folks, and we'd kind of like to dust the thing off and get it passed and get it signed into law. And maybe good people like you can enlighten me as to how this is the same position that you took in 1994 because it sure looks to me like there's a lot of extra stuff in this in an area where you said, "Hey, we don't want more stuff."

Mr. PARR. Congressman, I think you need to recognize that that letter pertained to H.R. 3800, which was a bill that my company, my trade association and all my colleagues around the table here worked extremely hard on. It took a lot of work. We came up with a delicate but acceptable compromise that all the parties could get behind.

Not one of us loved every provision in that bill, surely, but it was certainly a compromise. In fact, I'm quite proud to have been part of that consensus-building process, to get that bill.

That letter you referred to came late in the day and said, "We've worked very hard to get here. It's a delicate compromise. We want Superfund and we want it badly and we're willing to accept some things that aren't entirely up to our goals to get this bill through. Let's not do something at the 11th hour that will upset this particular bill, this particular compromise."

I think we're in a different place today and again, I would stress I think that the chairman's draft is very consistent with all of the positive elements of H.R. 3800.

Mr. WYDEN. Let me just ask one question for you, Mr. Bone. Is it your position that States, under title IX, can apply their own standards, including any preferences for specific methods of remediation?

Mr. BONE. Very simple answer: yes.

Mr. WYDEN. So you do not support imposition under title IX of any restrictions on remedies that the States can impose.

Mr. BONE. No, we do not. We just want a fair chance to get a site-specific decision made.

Mr. WYDEN. A question for you, Ms. Smith, and I appreciate the Chair's indulgence. Under the Reform of Superfund Act is there any requirement that the site in my area, the East County site, would have to be cleaned up in order to ensure that our back-up drinking water is protected?

Ms. SMITH. Mr. Wyden, from listening this morning to your description of that site, I'd say it's unclear. I think it's a murky question because if the community is not now using the water, then basically on the administrative record, in order to consider a different use, a drinking water use of that water, the bill has you having to show on the record a substantial probability of that use occurring.

Is there a substantial probability of a drought occurring and the need? I don't know. I don't know how you make that showing.

Suppose you make that showing, though, that the community is able to get in there and make that showing convincingly. This bill does not require that that be accommodated. One option could be to tell the city of Portland that they need an alternative water supply rather than that water supply.

Mr. WYDEN. My time is up and the chairman's been very indulgent. I just want to say I want to work very closely with you, Mr. Chairman, on this point because our folks are concerned that this might have to be litigated in court with the city having the burden of proof, and I want to work closely with you to address this responsibly.

Mr. OXLEY. I thank the gentleman. And let the Chair just state that I know the gentleman's concern for dusting off last year's bill. Last year's bill is not coming back. Elvis is not coming back. We've got a new outlook here and that's just the way it's going to be.

The subcommittee will stand in recess until after the vote on the floor.

[Brief recess.]

Mr. OXLEY. The subcommittee will come to order and the Chair recognizes the gentleman from Massachusetts Mr. Markey.

Mr. MARKEY. Thank you, Mr. Chairman, very much.

Mr. MacMillan, in the remedy section and risk assessment language of the bill, the protective exposure levels are specified as the 90th percentile. Could you describe for us exactly what that means?

Mr. MACMILLAN. Ah, now there's a challenge, Congressman.

Mr. MARKEY. Do it very briefly.

Mr. MACMILLAN. I will do it by simply saying that I believe that—on second thought, I will not even try. I will leave that to a more technical person. Perhaps Mr. Bone should try this.

Mr. MARKEY. I don't have time for an exhaustive—could I summarize it by saying that 90 percent of the people in the area are not exposed to the risk? Is that a fair summary, Mr. MacMillan?

Mr. MACMILLAN. I believe that it means that 90 percent of the people are not exposed.

Mr. MARKEY. Are not exposed. But 10 percent could be.

Mr. MACMILLAN. Could be.

Mr. MARKEY. Thank you, Mr. MacMillan. Now, does that mean that the proposed risk assessment guidelines are based on a system that 10 percent are not adequately protected from exposure to hazards?

Mr. MACMILLAN. Is that question directed to me?

Mr. MARKEY. That is, Mr. MacMillan. You're the expert.

Mr. MACMILLAN. I think that there could be situations in which a site-specific risk assessment based on a 90 percent distribution could, in fact, expose some particularly vulnerable individuals to risk.

Mr. MARKEY. Thank you. Do you think, Mr. MacMillan, that it's right to just write off 10 percent of the population like that?

Mr. MACMILLAN. I do not.

Mr. MARKEY. Okay. Now, what about members of our society? What if that 10 percent included 20 percent at a much higher percentage of children that were in that 10 percent population? Is there any provision in the bill which would provide additional pro-

tection to those people, to children who might be in that exposed position?

Mr. MACMILLAN. If there is, I'm not aware of it.

Mr. MARKEY. Thank you. Now, in your testimony you raised the issue of whether or not it is appropriate to base risk assessment on only 90th percentile of exposure. Do you think there should be provisions in the proposed legislation to provide more protection for this vulnerable community?

Mr. MACMILLAN. I think you can never get 100 percent. What I'm raising by my testimony was the basic point that there are still many unresolved questions in site-specific risk assessment and that because of those unresolved questions, you cannot be totally dependent on it and you need additional safety nets.

Mr. MARKEY. You need additional safety. Thank you.

Now, the guidelines, Velma Smith, the guidelines set up to establish these exposure levels are specifically limited to carcinogenic substances. Is that correct?

Ms. SMITH. Yes, sir.

Mr. MARKEY. Does it deal with non-carcinogens?

Ms. SMITH. It doesn't specifically speak to non-carcinogens anywhere in the bill that I can find.

Mr. MARKEY. Well, we know that many Superfund sites contain a number of toxins which are not classified as carcinogens. We also know that these pollutants can cause a variety of serious health problems, including kidney damage, mental retardation and reproductive health problems.

Don't you think the bill should provide some amount of protection against these non-carcinogenic yet quite hazardous substances?

Ms. SMITH. Absolutely.

Mr. MARKEY. Do you think we should include in the draft legislation protection against the health risks from these substances?

Ms. SMITH. Absolutely.

Mr. MARKEY. Cyanide, lead, mercury, cadmium?

Ms. SMITH. Absolutely.

Mr. MARKEY. Thank you. That's very helpful to us, because they do pose real health risks.

Mr. Mattia, let me give you a fact pattern and ask you a question. A company or several companies ran a facility for 50 years and were responsible for polluting the facility, releasing mercury, PCB's and other hazardous substances between 1970 and 1985, 5 years after the first Federal Superfund bill was passed. The contamination was so severe that it was listed on the NPL.

Two years ago the company settled with the Government in a judicial consent decree and agreed to pay $40 million for the cleanup; $10 million has already been spent before the date that this bill would become law; $30 million under the consent decree remains obligated.

Now, under this bill, the retroactive liability discount would require the Government to write a check for $15 million, 50 percent of the $30 million yet to be spent, to some of the largest and wealthiest corporations in the world.

Now, we all know that both Federal and State resources are constrained and thousands of sites remain to be cleaned up. Does it

make any sense to you, Mr. Mattia, for the Government to be sending rebate checks back to companies who have already entered into judicial consent decrees to clean up the problems which they created, rather than passing it over to Federal Government taxpayers?

Mr. MATTIA. You're making the assumption that they created it because of the joint and several provisions in the existing law.

Mr. MARKEY. That's correct. Otherwise they would not have entered into it, yes.

Mr. MATTIA. Well, there's the rub, sir. If you had an equitable distribution of the liability, I don't think that you would have that problem which you have today.

Mr. MARKEY. So you're saying that a lot of these companies were, in fact, not liable but they just were forced to sign the consent decree?

Mr. MATTIA. I didn't say that they weren't liable. I said that the equitable distribution of liability would resolve that problem, versus the strict and several liability——

Mr. MARKEY. So you think it would be equitable for the taxpayer to pay $15 million to that corporation, rather than the company that had already entered into the consent decree?

Mr. MATTIA. Well, sir, you're asking a question that does not——

Mr. MARKEY. It does exist. These are cases——

Mr. MATTIA. Oh, I understand they exist and my company has been involved in paying some of those——

Mr. MARKEY. So you support the idea, then, of voiding those consent decrees and having the Federal Government pick up the tab rather than the company under the consent decree?

Mr. MATTIA. Yes, in the context of if there was not an equitable——

Mr. MARKEY. This doesn't deal with whether it was a correct or incorrect, equitable or inequitable. Even the companies that were found and everyone knows did it, and they did it after Superfund was passed, are out and the Federal taxpayer has to pick up the tab. Is that right or——

Mr. MATTIA. If they did it after Superfund was passed——

Mr. MARKEY. Between 1980 and 1985, that's right.

Mr. MATTIA. Between 1980 and 1985 I would say that probably liability should be retained with them.

Mr. OXLEY. The gentleman's time has expired.

Mr. MARKEY. That's helpful to us because this bill does not, in fact, accomplish that goal.

Mr. OXLEY. The gentleman's time has expired.

Mr. MARKEY. Thank you.

Mr. OXLEY. I would only point out to my good friend from Massachusetts that the 90 percent language, 90th exposure percentile that he referred to in our bill was in last year's bill, which we both voted for, and that remains a part of, we think, a reasonable compromise as we're dealing with this issue.

And I also might point out, while I'm at it, that I share the gentleman's concern for the Federal taxpayer but only point out that the taxes are paid essentially by the polluters. The gentleman would have some folks believe, and actually some people in the media believe, that Joe Taxpayer is funding for this program and, of course, that's not the case.

Let me——

Mr. MARKEY. Would the gentleman yield on that point?

Mr. OXLEY. I'd be glad to yield.

Mr. MARKEY. I thank the gentleman. But that individual—all polluters are contributing to the general fund but this particular polluter at this particular site that's now going to be out is going to be able to dip into a fund which has been contributed to by all other companies. And that's not right because all other companies similarly should not have to kick in to clean up a site where a particular company has been, by a consent decree, held responsible and accepted the responsibility already.

So that's the problem because they are——

Mr. OXLEY. I just wanted to correct the record. The Federal taxpayer—we're not talking about Mr. and Mrs. Six-Pack here. We're talking about major corporations that pay corporate income tax, the chemical feedstock tax and the oil-based tax, and that's far different from your folks in Medford who are paying their Federal income tax.

Mr. MARKEY. But for those other companies, they have to pass it on to all of the consumers in Medford in the cost of products. So I'm saying why shouldn't the company that did it pay it, rather than have the other companies pass that right through to their population.

And with regard to last year's bill, as you know, Mr. Chairman, we don't have the same provisions there this year. Last year's bill did, in fact, deal with the sensitive subpopulations, in terms of protections given to them. Your bill this year does not.

So I voted for a provision last year but not for the provision you have in your bill. The subpopulations were not protected.

Mr. OXLEY. The language is rather clear. If I could just direct the gentleman to the section of the bill: "If numerical estimates of risk or health effects values are provided, the President shall specify the population that is the subject of the estimate. To the extent feasible and scientifically appropriate, the President shall include, among other estimates, central estimates of risk or health effects," and so forth.

I think that language, if the gentleman would check, in our proposal is directed at exactly the population that——

Mr. MARKEY. Is it the identical language as last year?

Mr. OXLEY. It's not the identical language but we think it's a lot better drafted and really reflects what we're trying to—I don't want to get into a debate right now with the gentleman.

Mr. MARKEY. In your language do you intend for there to be a separate set of criteria——

Mr. OXLEY. The President would be given that authority to select that population that would be at risk, yes.

Mr. MARKEY. To set in place regulations to protect that——

Mr. OXLEY. I assume that the President would have the ability to do that, to define that population, of course.

Mr. MARKEY. And to put the regulations on the books.

Mr. OXLEY. Well, I don't know how else you'd do it.

Mr. MARKEY. Okay. I just want to say the words.

Mr. OXLEY. Let me turn now to the panel and ask them, last year's proposal preempts State-applicable standards in a number of

ways. The first panel that we had talked about the ROD reopener provision. I have several questions.

Do the panelists feel that ROD's should never be reopened? Mr. Mattia?

Mr. MATTIA. No. I think that in reopening of a ROD or the ability to reopen a ROD, there should be a limit to the time sequence. I mean, if you're going to go into a process where you're reopening a ROD where you're going to have a time delay that's extensive, there's got to be some provision that that not happen.

In reopening a ROD, today there are cases—and I know you have a million-dollar provision in your bill on reopening ROD's—there are cases, and I've been involved in some, where it makes common sense to reopen the ROD, but we're precluded and it does cost us several millions of dollars in extra remediation actual construction costs because we can't. When you find things in the field that weren't reflective in the original concept, it's a very different task to reopen that ROD, and I think it should be able to be reopened.

Mr. OXLEY. Dr. Bone?

Mr. BONE. Yes. It's obvious that if you have an improved remedy selection procedure, which your bill certainly has, that you would like to extend that back as far as you could without seriously impairing, of course, progress that was proceeding.

Now, where is that line? Is it a dollar value? Is it a time line? I'm not exactly sure, but it's clear that at least that option ought to be available to reopen some of those ROD's because——

Mr. OXLEY. That's why we have a million-dollar threshold in there, which I think gets most everybody's attention.

Mr. BONE. And I think you may find that when you reach the finish line for a given site, that reopening that ROD, you may reach the finishing line of completed on the site faster, even though there may be some delay, by reopening the ROD because the second remedy may be considerably more rapid to accomplish. That was the case in the site I quoted in Ohio. Certainly when the ROD was reopened there, we're going to get to the finish line a lot faster than the many years of on-site incineration it would have taken with the previous ROD.

Mr. OXLEY. Mr. Parr?

Mr. PARR. Mr. Chairman, I think if we're going to realize the full extent of reform that your draft offers, we do need to be able to go back and look at certain past decisions when those decisions were flawed.

I think, as we heard earlier today in Mr. Crapo's statement, that community groups would also like the opportunity to go back and have the Agency revisit some of their past decisions where they have got some serious problems with those decisions. I think we ought to do it in a way that it's an expedited process and it's timely. I think we should do it in a way that ensures that it doesn't serve to needlessly slow the system, but I think an opportunity to revisit certain remedies would be very beneficial to the program.

And with your indulgence, I'd like to see if I can clarify what I think is a misunderstanding around the 90th percentile, based upon the discussion I heard a moment ago. In fact, it in no way suggests that there would be any percentage of the population at any site that would go unprotected.

It is simply a test that one can employ to ensure that when you compound conservative assumptions in generating a risk assessment, that you don't so do that as to create wholly hypothetical assumptions about exposure.

Mr. OXLEY. Which leads me to my next question and that is Thomas Grumley was here in November 1993, Assistant Secretary for environmental restoration and waste management at DOE, and he stated, "EPA contractors come in, turn the crank, use lots of assumptions that tend to cascade conservative assumption upon conservative assumption and then hit a particular waste site with an estimated risk that simply doesn't bear any relationship to what anybody who is knowledgeable actually thinks is a real risk at that site."

Does the panel believe that ROSA makes significant steps to address this problem? Let me ask Mr. MacMillan first, do you acknowledge there is a problem, first? And, if so, does our legislation address that problem?

Mr. MACMILLAN. I think that the site-specific risk assessment process is very subjective. It's still a developing process, lots of scientific uncertainties. I think it can lead to overly conservative results. On the other hand, I think it can lead to inadequately protective results.

I think that we are, unfortunately, still some years away from being able to rely on the process, and it is for that reason that while we look to the day when that will work effectively, I just don't think it's something one can count on or trust, at least insofar as the most contaminated sites and most contaminated concentrations of waste are concerned.

Mr. OXLEY. So you want to continue with the status quo, then?

Mr. MACMILLAN. No. I think that many of the things that the drafters of your bill and yourself have done in trying to standardize and focus and put some rationality into the risk assessment process are major steps in the right direction.

My problem is that even with those steps, long overdue and welcome steps, even with those steps, I think that the risk assessment process is still so inherently subjective, so inherently malleable that frankly, you can get a lot of different results, depending on which risk assessor you talk to. It's forum-shopping taken to its ultimate in many places.

Mr. OXLEY. Other members? Dr. Bone?

Mr. BONE. But I think what your bill does, the present system is devised so in order to be conservative, and it was designed that way on purpose, you keep piling conservative assumption on top of conservative assumption.

I think the result of your bill will be that you consider the real risk and its uncertainty, with the error bars on it, and you construct a distribution that you can make a waste management decision from. And you can pick it off there anywhere you want, depending on how much conservatism you want to put in the decision, but it isn't preburied in the calculation in the first place.

Now all the conservative assumptions are buried in the risk calculation and you don't even know where you are. You just know you're extremely conservative. So I think it's a great improvement over what's out there now.

Mr. OXLEY. My time has expired. The gentlelady from Arkansas.

Mrs. LINCOLN. Thank you, Mr. Chairman, and I will be brief.

I'd just like to bring a point that was made earlier by Mr. Parr in his testimony in relationship to groundwater. And for those of us in rural areas—I know my colleagues hear a lot about that, but for those of us that do have extensive rural areas depend heavily on groundwater, not only for drinking sources but also for watering and irrigation of crops as well as livestock. It's a very important factor to us and it's water that moves, especially in the formations like we have, very rapidly.

I was very interested in what Mr. Parr had to say in terms of provisions that could be added that would be very helpful there. Mr. Parr, if you would expand on that, or if the other members have concerns or maybe some comments on the groundwater issue, making sure that what we're talking about is keeping a safe supply of drinking water in those areas that could be affected.

Mr. PARR. We recognize, Congresswoman, that groundwater is a very valuable resource. I, in fact, receive my water at home from a well.

I think it's important that we separate what we can and should do with contaminated groundwater, where we've been beating our head on a rock for many a year, and what we can do with uncontaminated groundwater. That's a resource that is still in the shape that it can be used, and where you have usable groundwater, by all means we should protect it from becoming contaminated because we have learned that once it's contaminated, we have a devil of a time solving that problem.

So I think the draft would certainly benefit from clear and explicit provisions that set up a goal of protecting usable, uncontaminated groundwater from becoming protective, and then let's use flexible risk-based decisionmaking that looks at technical practicability to decide what we should and can do in those unfortunate cases where groundwater is already contaminated.

Ms. SMITH. I'd like to just comment and also commend Mr. Parr for bringing up this issue because I think it is one of the most egregious flaws of this piece of legislation, that there is no imperative to clean up groundwater or to even contain the contamination.

I think, in terms of placing this burden on anticipated future uses and trying to establish a probability that you're going to need groundwater in the future before it will be cleaned up, it's a burden for a case where Mr. Wyden was talking about, the city of Portland. They've had the opportunity to look ahead, to do forecasting, to no doubt hire a hydrogeologist and look at the groundwater situation in the area.

A lot of small communities like communities in Arkansas don't have those resources, and the burden in this bill will be immense on them.

Mrs. LINCOLN. Do any of you have comments or ideas or opinions on how the bill could be enhanced in provisions for groundwater, or problems with that?

Mr. BONE. No. I agree entirely with Michael. In fact, I've been talking to your staff about the very subject.

Mrs. LINCOLN. Mr. Chairman, I thank you for that and would just like to encourage the chairman and ask that he be willing to

work with us on a reasonable solution in terms of groundwater, and I yield back the balance of my time. Thank you.

Mr. OXLEY. We certainly will make that effort. The gentleman from New Jersey.

Mr. PALLONE. Thank you, Mr. Chairman. I obviously missed the panel and I'm trying to read through some of the testimony here and of course I went first to Miss Smith because I gather she's the environmental representative on the panel.

During my opening statement, I talked about this preference towards the selection of permanent solutions in the cleanup that I believe make sense and that I believe is seriously changed by the draft legislation. And then I talked about the Chemical Insecticide Corporation site in my district, just as an example, because this whole idea of a permanent solution has come up there repeatedly because, as you know, we've had other votes—I don't know, in various bills over the course of the last couple of years—where this issue came up and there were options, as part of the bill, to basically eliminate that permanent solution.

I just wanted to read again, if I could, what I said about the CIC site in the context of what you said. Just tell me, if you can, if I'm looking at this accurately, at least in your point of view. I said, "Because this legislation makes cost control as high a priority as human health protection and removes the law's mandate to permanently treat waste, the CIC cleanup would have ended, now that the site is capped and fenced."

Basically, they put a cap over the site and they put a fence around it, but they haven't gone to the permanent solution.

And they say, "Under this legislation, groundwater protection is considered unimportant unless the polluted groundwater poses a very direct threat to drinking water supplies." So again, there would be no further cleanup. We have a groundwater problem but we haven't been able to identify that it directly relates to drinking water.

And finally, "There would be no off-site cleanup, since the bill allows no remedial actions to be taken to protect ecological resources except under very narrow circumstances."

Again, we have a very active group at the CIC site which pointed out that there was a lot of off-site damage, if you will, that there was significant damage to groundwater that's not used for drinking water, and that has been very critical of the EPA because they felt that they were just going to put the cap over and the fence, and leave. And now, of course, the EPA says they're not going to do that and they're talking about doing different things to try to clean up the site beyond that.

But this is my analysis of the bill and it seems to go along with what you said in your written statement. I mean, that's it. I just wanted you to comment on that.

Ms. SMITH. That's basically our grave concern is that what you will do—this bill places treatment at the tap, providing people alternative water on par. Institutional controls—zoning it for no habitation—is placed on par with treatment.

Someone earlier talked about a mandate, to mandate permanent solutions and treatment. The law doesn't have a requirement but a preference, a preference which drives you to try to find that per-

manent solution so that you won't have to tend that site for decades and decades.

Under this bill, in order to calculate costs and benefits, you must use net present value. So after a while, even if you're still tending that site 20, 30 years from now, those costs mean nothing now, compared to what it would cost to invest right now to clean up that site permanently.

I think this bill is going to give us fences and filters and not cleanup.

Mr. PALLONE. Which is essentially what we have at the site now. I mean, they've progressed to the point where they have a cap, they have a fence, but we know that there's contaminated groundwater and we know that there's a lot of off-site contamination, and the site obviously can't be used. And this is what the citizen groups are saying.

Ms. SMITH. This is the perfect illustration that that sort of thing happens now, and we're concerned of how much worse does it get under this bill.

In addition, under this bill the important thing is the EPA, I believe, could be pressed into a situation, if you look at the liability and the release sections, they could be pressed into giving a covenant not to sue and releasing that company from future liability if something goes wrong with that cap.

Mr. PALLONE. Okay. Thank you, Mr. Chairman.

Mr. OXLEY. I thank the gentleman.

We appreciate all of your testimony today. We have a vote on the floor of the House and this would be a good time to adjourn the subcommittee, and the subcommittee is so adjourned.

[Whereupon, at 2:34 p.m., the subcommittee was adjourned, to reconvene at the call of the Chair.]

REFORM OF SUPERFUND ACT OF 1995

THURSDAY, OCTOBER 26, 1995

HOUSE OF REPRESENTATIVES,
COMMITTEE ON COMMERCE,
SUBCOMMITTEE ON COMMERCE, TRADE,
AND HAZARDOUS MATERIALS,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:40 a.m., in room 2123, Rayburn House Office Building; Hon. Michael G. Oxley (chairman) presiding.

Members present: Representatives Oxley, Tauzin, Upton, Gillmor, Crapo, Bilbray, Whitfield, Ganske, Norwood, White, Wyden, Furse, Markey, Manton, Pallone, Brown, Lincoln, Deutsch, Stupak, and Dingell [ex officio].

Staff present: Nandan Kenkeremath, majority counsel, James Barnette, majority counsel, Frederick Eames, majority counsel, Hugh N. Halpern, majority professional staff member, Richard A. Frandsen, minority counsel, David Tittsworth, minority counsel, and Alison Berkes, minority counsel.

Mr. OXLEY. The subcommittee will come to order.

I would like to invite our 2 members to come forward, Representative David M. McIntosh and Representative William H. Zeliff, Jr., who comprise panel I. Welcome to the subcommittee, Chairman McIntosh and Representative Zeliff. We will begin with the senior member, the gentleman from New Hampshire, Mr. Zeliff.

STATEMENTS OF HON. WILLIAM H. ZELIFF, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW HAMPSHIRE; AND HON. DAVID M. McINTOSH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF INDIANA

Mr. ZELIFF. Thank you, Mr. Chairman. I would like to commend you and your staff for your hard work and all the many hours that you have put into this bill. I would like to say at the outset of my testimony that aside from the liability and related funding provisions in the current version of H.R. 2500, I very enthusiastically support the bill.

Mr. Oxley, I appreciate your continued willingness to work with me and others who share our concerns to achieve what we share as a common goal, the full and complete elimination of Superfund's retroactive liability. I know in your heart and soul that that continues to be your goal.

Soon after being elected to Congress in 1990, I learned that I had 14 NPL sites in my district and my district had the fortunate designation—I guess I would call it fortuntate—of being the fourth

highest density Superfund district in the Nation. After hearing dozens of real life horror stories of what these sites were doing to small businesses and municipalities, I formed the New Hampshire Superfund Task Force.

The task force operated out of the University of New Hampshire and worked 3½ years on meaningful Superfund reform. Thirty-five New Hampshire citizens contributed their time and their effort and their resources to one of our government's number one problems. We came up with a series of recommendations which I turned into H.R. 4161, the Comprehensive Superfund Improvement Act, and introduced it in the 103d Congress.

While that bill addressed many different areas, the most important part of my bill addressed liability, specifically elimination of retroactive liability and the replacement of joint and several liability with a binding fair share allocation system.

This year I have introduced H.R. 2256. This is significant legislation because it presents a road map of what I believe is the best way to make Superfund work in the fairest and quickest way possible. My legislation will repeal Superfund's unfair, unjust and un-American system—I repeat—un-American system of retroactive and joint and several liability system for actions that were legal at the time that they were done. They will be replaced with a fair share liability system that will only hold people responsible for what they actually contributed to a Superfund site.

My written testimony, which has been supplied to the subcommittee, gives further detail on the exact provisions of my bill.

Despite the billions of taxpayer dollars that have been spent on Superfund, we now see that a mere 18 percent of Superfund sites have been cleaned up. This raises the obvious question of whether or not we are getting our money's worth. These facts, especially when combined with the GAO report recently which says that only one-third of all Superfund sites pose an actual risk to human health, make it obvious to me that we are not getting our money's worth.

What is costing Americans so much money while causing these sites to sit idle for years with no cleanup? It is Superfund's misguided liability system. We can make all the reforms and changes we want to make to the Superfund program, but if we do not fundamentally reform the liability system, we are going to be back here again having this same conversation in another 1 or 2 years.

Taxpayers are spending billions on lawyers while very few of these sites are getting cleaned up. Last week in the Small Business Committee we held a hearing on the impact of Superfund liability on small businesses. What we heard were stories of small businessmen and women from all over the Nation tell us how they have been brought to the brink of bankruptcy by this program, all brought about by the current liability system.

We also learned that the Department of Justice spends over $30 million per year on Superfund reinforcement. That is more than they spend on clean water, clean air and RCRA reinforcement combined.

In addition to this feeding frenzy for lawyers, the Superfund liability system has created an atmosphere in which the U.S. Environmental Protection Agency acts like prosecutor, judge and jury.

They assume you are guilty until you can prove yourself innocent and threaten you with huge fines and criminal action if you do not do what they say.

Included in my written statement is a copy of a letter sent by EPA to a businessman in New York. I urge my colleagues to take the time to read this letter and imagine yourself as a hardworking American citizen who suddenly receives this letter from your government. Once you have answered this letter, however, your journey is just beginning. You will have to withstand further EPA inquiries and do hours of tedious work looking for old records from decades ago which may no longer exist and pay lawyers to represent you and help prove your innocence. Even then you are faced with third-party suits or insurance litigation to recover some or all of your costs.

EPA and the Department of Justice have taken a program designed to clean up the Nation's most toxic sites and turned it into a program that feeds the legal system and creates an atmosphere of where they have complete and total control over the fate of thousands of small businesses.

There is such a thing as too much government control, as we all know too well. Superfund's liability system in addition to all of its other failures has also led to out of control Federal bureaucracy at EPA and DOJ at the expense of hardworking Americans.

Another gentleman who testified before the Small Business Committee told us about how he had been a PRP for 8 years and spent over $10,000 defending himself against a false charge. Then, moments before a congressional hearing on Superfund reform earlier this year, he was told by EPA Administrator Browner that he is no longer a PRP at that site.

While he was happy to have been let off the hook, the gentleman was livid at the fact that he had spent nearly a decade and thousands of dollars fighting to prove his innocence only to be told before a congressional hearing that he was free just so political points could be made that they are being cooperative.

Why was this man put through the expense and the years of personal terror by the EPA? Why are tens of thousands of others similarly persecuted by EPA? It is the liability system, in my judgment, plain and simple, and that's why.

In summary, the retroactive liability system in current laws costs us billions of dollars, has delayed cleanups for over 10 years, gives government entirely too much control, and creates an atmosphere in which there is absolutely no effort made to cooperate, and in which the constitutional right of innocent until proven guilty is thrown right out the window.

The people of the United States deserve nothing less than a full repeal. They deserve a clean environment and they deserve to be assured that their hard earned tax dollars are going to be used to clean up the sites rather than pay these endless armies of lawyers.

I urge my colleagues to examine every possible method to repeal retroactive liability before they take the final vote on this legislation. Holding people responsible for things that they did that were perfectly legal is un-American, unfair, unjust, and must be changed. Superfund is the most flawed law on our books, and it is

unconscionable for us as legislators to ignore a process which has destroyed so many people and destroyed so many businesses.

I urge you, Mr. Chairman, to take action now. We must do what's right. Let's not use a Band-Aid; let's use a tourniquet before the patient dies.

Thank you, Mr. Chairman.

[The prepared statement and attachments of Hon. William H. Zeliff, Jr., follow:]

PREPARED STATEMENT OF HON. WILLIAM H. ZELIFF, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW HAMPSHIRE

I thank the Chair and commend you for the hard work you and your staff have put into this bill. I would like to say at the outset of my testimony that aside from the liability and related funding provisions in the current version of H.R. 2500, I support the bill. Mr. Oxley, I appreciate your continued willingness to work with me and others who share my concern to achieve what we all share as a common goal—the full and complete elimination of Superfund's retroactive liability.

Soon after being elected in 1990, I learned that I had 14 NPL sites in my district. After hearing dozens of real-life horror stories of what these sites were doing to small businesses and municipalities, I formed the NH Superfund Task Force.

We worked for about a year to study the problems and make some suggested solutions. We came up with a series of recommendations which I turned into H.R. 4161, the "Comprehensive Superfund Improvement Act," and introduced in the 103d Congress.

While that bill addressed many different areas, the most important part of my bill addressed liability. Specifically, the elimination of retroactive liability and the replacement of joint and several with a binding fair share allocation system.

This year I have introduced H.R. 2256. This is significant legislation because it presents a map of what I believe is the best way to make Superfund work in the fairest and quickest way possible. My legislation will repeal Superfund's unfair, unjust, and un-American retroactive and joint and several liability system for actions prior to 1987 that were legal at the time. They will be replaced with a binding proportional liability allocation system that will only hold people responsible for what they contributed to a superfund site to a superfund site after 1986.

My written testimony—which has been suppled to the Subcommittee—gives further detail on the exact provisions of my bill.

If we look briefly at the 15-year history of this program, we will see that Superfund was created in 1980 with a trust fund of $1.6 billion to clean up what was then assumed to be a few dozen waste sites. Congress increased the financing to $10.2 billion in 1986, then to $15.2 billion in 1990. Bear in mind that these numbers are only the Federal contribution. Small businesses and other private parties are stuck with the brunt of these costs.

Despite these billions of dollars of taxpayers' money being spent for such a laudable cause, we now see that a mere 18% of Superfund sites have been cleaned up in that same time period. This raises the obvious question of whether or not we are getting our money's worth. These facts—especially when combined with a GAO report released recently which says that only one-third of all Superfund sites pose an actual risk to human health—make it as obvious to me that we are not getting our money's worth.

It is the liability system of Superfund which has brought this program to its knees. We can make all the reforms and changes we want to the Superfund program, but I assure my colleagues that if we do not make major changes to the liability system, we will all be back here again having the same conversations in just a few more years. We are spending billions on lawyers while very few of these sites are getting cleaned up.

Last week in the Small Business Committee we held a hearing on the impact of Superfund liability on small businesses. What we heard were stories of small businessmen and women from all over the nation tell us how they have been brought to the brink of bankruptcy by this program—all brought about by the current liability system.

What we also heard is the Department of Justice spends over $30 million per year on Superfund enforcement. That's more than they spend on Clean Water, Clean Air, and RCRA enforcement combined.

In addition to this feeding frenzy for lawyers, the Superfund liability system has ated an atmosphere in which the United States Environmental Protection Agency

acts like prosecutor, judge, and jury. They assume you are guilty until you can prove yourself innocent, and threaten you with huge fines and criminal action if you do not do what they say.

Included in my written statement is a copy of a letter sent by EPA to a businessman in New York. Let me read to my colleagues some passages from this letter to give you an idea as to the way our own Government approaches its taxpayers.

After a page and a half of legalspeak explaining under what authority they act, the letter reads:

> Pursuant to these statutory provisions, EPA and DEC hereby require that you answer the questions asked in the enclosed "Request for information letter..."

It goes on...

> Your failure to respond to the "Request for Information" within [30 days] may subject you to an enforcement action...[which] may include the assessment of penalties of up to $25,000 for each day of continued noncompliance....If any part of your response is found to be untrue, you may be subject to criminal prosecution."

The letter thon goes on with 3 pages of instructions and 3 pages of questions. None of which can be answered without the assistance of lawyers and hundreds of manhours—time and money taken away from doing business just to prove your innocence—time and money taken away from expansion and job creation.

Once you have gone beyond this step, however, the road is long and arduous. You have to withstand further EPA inquiries, endure hours of tedious work looking for old records from decades ago which may no longer exist, if they ever existed at all, pay lawyers to represent you and help prove your innocence—or make a settlement (which is often far cheaper than actually pursuing a small share, or even your innocence). Even then you are faced with third party suits or insurance litigation to recover some or all of your costs.

One gentleman who testified before the Small Business Committee told us about how he had been a PRP for ?? years, and spent ?? dollars defending himself. Then, moments before a Congressional hearing on Superfund reform earlier this year—he was told by EPA Administrator Browner that he was no longer a PRP at that site.

While he was happy to have been let off, the gentleman was livid at the fact that he had spent all that time and all that money, then be told before a Congressional hearing that he was free just so Administrator Browner could use it for political points and say "see how cooperative we are?" Why was this man put through the expense and years of personal terror by EPA? Why are tens of thousands of similarly persecuted by EPA?

As I have pointed out, the retroactive liability system in current law costs us billions of dollars, delays cleanups for over 10 years, and creates an atmosphere in which there is absolutely no effort made to cooperate and in which the Constitutional right of "innocent until proven guilty" is thrown right out the window.

In closing, let me be clear on one last point. The people of the United States deserve nothing less—they deserve a clean environment and they deserve to be assured that their hard-earned tax dollars are going to clean up these sites rather than pay these endless armies of lawyers.

I urge my colleagues to examine every possible method to repeal retroactive liability before they take the final vote on this legislation.

Thank you once again, Mr. Chairman, and I stand ready to continue working with this committee and others toward the goal of a cleaner environment.

SECTION - BY - SECTION SUMMARY
H.R. 2256

TITLE I -- LIABILITY

Sec. 101: Release of Evidence

Calls for timely public access to information (14 days); requires PRPs be supplied evidence of liability by EPA.

Sec. 102: Elimination of retroactive liability

Eliminates retroactive liability for wastes legally dumped before 12-31-86.

Sec. 103: Limitation on Liability of Certain Owners and Operators

Exempts grantees of conservation easements unless responsible directly for pollution; safe harbor for innocent landowners; prospective purchaser protections.

Sec. 104: Contribution protection

Protects entities which have settled with the government from any further costs.

Sec. 105: Contiguous Properties

Exempts owners of property near NPL sites as owner/operators by issuing assurances of no enforcement action from EPA.

Sec. 106: Lender and Fiduciary Liability

Requires EPA to issue regulations to exempt lenders and fiduciaries from being liable under Superfund if they did not contribute to the waste.

Sec. 107: Definitions

Defines necessary terms for liability section.

Sec. 108: Assignment of Shares of Liability for Costs of Response Actions at NPL Sites

Establishes proportional liability scheme and requires that orphan shares be picked up by the fund. Liability scheme is binding.

Sec. 109: Enforcement of Response Actions through Joint and Several Liability

If a party refuses to participate in the allocation process or refuses to cooperate with the results of the process, they may be held jointly and severally liabile for the site.

Sec. 110: Establishment of Binding Allocation of Responsibility Process

Adds a Title V to CERCLA:

"Sec. 501: General Rules Governing Binding Allocations of Responsibility

Establishes "allocation panels" for each site, consisting of three administrative law judges appointed by EPA Administrator.

"Sec. 502: Qualifications and Powers of Administrative Law Judges and Allocation Panels

Administrative law judges appointed by Administrator must complete 40 hrs. of education and training, as specified by Administrator, on the rules of this act and certain scientific education.

Also establishes power of allocation panels, which includes subpoena power to collect necessary information.

"Sec. 503: Specific Rules and Procedures

Lays out specific procedure for liability assignment.

Initial Petition: *Within 30 days of remedial investigation study, EPA or state will file petition identifying site, PRPs, and summarizing legal and technical issues specific to site. Initial petition will also include name of person appointed by Administrator to be "guardian of the fund."*

Statement of Parties: *Within 30 days of initial petition, all parties may submit statements regarding defenses to liability, additional facts, and any further PRPs (which may be done for up to 120 days of initial petition).*

Also within 30 days of initial petition, allocation panel may begin requesting information from all parties (who then have 45 days to respond).

Initial Publication of All PRPs: *Within 6 months of initial petition, allocation panel will publish all PRPs. Allocation panel may add PRPs until final decision is made. Also within that period, allocation panel will name "de micromis" parties.*

Advocacy Papers: *Within 30 days of publication, all parties may submit papers outlining how they propose liability determination and liability allocation should be done. Parties will also have this opportunity after the allocation panel's first report.*

Allocation Reports: *Within 90 days of publication, allocation panel issues report specifying on what basis it will allocate liability. Following second round of advocacy papers (above), allocation panel issues decision on liable parties and allocation of responsibility. Any PRP may request a hearing on these determinations. Allocation panel has discretion to honor that request. For period between filing of initial petition and 18 months following that filing, allocation panel may release any party deemed not liable from all future liability at site.*

Orphan Share: *Any party may submit evidence identifying one or more of liable parties whose share should be assigned to orphan share. Following receipt, allocation panel will assign orphan share.*

Final Binding Allocation Decision: *Within 18 months of initial petition filing, allocation panel makes final decision (which is binding), based on the following factors: (1) degree to which each party's contribution to a discharge, release, or disposal of a hazardous substance can be distinguished; (2) amount of hazardous substances contributed by the liable party at the site concerned, compared to total amount of hazardous substances at that site. The amount of nonhazardous substances contributed by the liable party may not be considered. (3) The degree of toxicity of hazardous substances contributed by the liable party; (4) degree of involvement of each liable party in the generation, transportation, treatment, storage, or disposal of the hazardous substance; (5) degree of care exercised by the liable party with respect to the hazardous substance concerned, taking into account the characteristics of such hazardous substance, and the relative culpability of that party for the threat to human health and the environment associated with the hazardous substance; (6) degree of cooperation of each liable party with federal, state, and local officials to prevent any harm to the public health or the environment; (7) weight of evidence as to the liability and the appropriate shares of each liable.*

De Minimis Settlements: *As part of final decision, allocation panel identifies all parties which contributed less than 1.0% of total waste. These parties may settle with EPA based on: EPA estimate of total site cleanup cost multiplied by de minimis party share, plus a premium to reflect the benefit of early and complete resolution of liability.*

"Sec. 504: Duty to Answer Information Requests and for Production of Documents

Requires all parties to submit all requested information to allocation panel during final binding allocation process. Penalty for non-compliance is assignment of a share which is up to 500% of otherwise allocated responsibility or up to 50% of total site cost (whichever is greater).

"Sec. 505: Civil and Criminal Penalties

Imposes civil penalty of $10,000/day for non-compliance with Sec. 504 or for submitting false or misleading information. Criminal penalties are fines and a maximum two year sentence.

"Sec. 506: Document Repository: Confidentiality: No Waiver

Requires allocation panel establish repository for information, ensures confidentiality of information submitted to allocation panels (violation of confidentiality requirements is subject to $25,000 fine).

"Sec. 507: Final Agency Action and Judicial Review

Binding allocation is final agency action. Any challenge to final decision of allocation must be filed in US District Court. Unless the court finds the allocation decision to be arbitrary and capricious or an abuse of discretion, or that the challenging party is not liable as a matter of law, the unsuccessful challenger must pay all attorney's fees incurred in defending the challenge and is held jointly and severally liable for the orphan share of the response costs at the site.

"Sec. 508: Collection, Enforcement, and Implementation

After the final allocation decision, any party which has incurred costs above the amount allocated to that party is considered a "creditor party" entitled to collect from "debtor parties" any or all of their shares of allocated response costs, depending upon the amount incurred by the creditor party. The creditor party is also entitled to collect from the Fund amounts corresponding to the orphan parties' allocated shares.

"Sec. 509: Transition Provisions

At sites where cleanup is ongoing at time of enactment, all deadlines and obligations are unaffected. At sites where cost recovery, enforcement, or contribution litigation is ongoing, such litigation is stayed until a binding allocation decision is issued. At sites where one or more PRPs have been determined to be liable for all past and future response costs, no binding allocation process shall be performed and all liability determinations remain in effect. At sites where liability has been partially determined, the binding allocation process shall proceed. The panel will give credit for any costs already incurred.

"Sec. 510: Voluntary Settlements

Any PRP may offer to voluntarily cover 100% of site costs at any point prior to final binding allocation.

"Sec. 511: New Binding Allocations of Responsibility

No final decision may be changed for 5 years, and only if a party demonstrates that there is at least a 35% increase in waste volume.

Sec. 111: Site Redevelopment

Gives exemption of liability for redevelopers of a former NPL site if they had no previous involvement with the site in regard to the waste.

Sec. 112: Liability of Response Action Contractors

Extends certain definitions with respect to contractor liability at NPL sites.

TITLE II: FUNDING:

Sec. 201: Hazardous Substance Revolving Fund

Establishes a new Hazardous Substance Revolving Fund which will prospectively receive all monies appropriated, credited, or transferred to the existing trust fund. For the purposes of the budget, these funds will be treated as "offsetting collections," *which does NOT put them off budget.* The use of this new fund is STRICTLY *limited to cleanup activities.*

FUNDING SUPERFUND REFORM WITHOUT A TAX INCREASE

(Need $2.2 to $2.4 billion annually)

(in billions)		**THESE NUMBERS DO NOT INCLUDE THESE OPTIONS (could be any combination of):**	
$1.5	*Direct taxes (see below)*	$0.5	*In savings as a result of remedial reform, which is expected to reduce costs by 35%*
$0.25	*General revenue taxes*	$0.2	*By requiring States to contribute as they do currently*
$0.2	*Agency PRP costs*	$0.3	*Capping governmental overhead*
$0.12	*Post-86 PRP liability*	$0.2 to $0.5	*Eliminating single-party sites (depending on definition used)*
$0.13	*PRPs who disposed illegally*		

$2.2 BILLION TOTAL

CURRENT SUPERFUND TAXES (in millions):

Oil	$557
Chemical	$250
EIT	$653
TOTAL:	**$1.46**

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION II
JACOB K. JAVITS FEDERAL BUILDING
NEW YORK, NEW YORK 10278-0012

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Re: Joint Request for Information Pursuant to 42 U.S.C. §9601 et seq. and Articles 3, 17, 19, 27, 37, 40 and 71 of the ECL concerning disposal of hazardous substances at the Onondaga Lake, Syracuse, New York.

Dear Mr. [redacted]:

The U.S. Environmental Protection Agency (EPA) is charged with responding to the release and/or threatened release of hazardous substances, pollutants and contaminants into the environment and with enforcement responsibilities under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (CERCLA), 42 U.S.C. §9601 et seq.

The New York State Department of Environmental Conservation (DEC) is also charged with responding to the release and/or threatened release of hazardous substances, hazardous wastes, pollutants and contaminants into the environment and with enforcement responsibilities in accordance with Articles 3, 17, 19, 27, 37, 40 and 71 of the Environmental Conservation Law of the State of New York (ECL), the rules and regulations promulgated pursuant thereto, and state common law.

EPA and DEC have documented the release and/or threatened release of hazardous substances, hazardous wastes, pollutants or contaminants into the environment at the Onondaga Lake Site, Syracuse, Onondaga County, New York. Pursuant to Section 104 of CERCLA, 42 U.S.C. §9604 and Articles 3, 17, 19, 27, 37 and 40 of the ECL, EPA and DEC may request certain information from parties who handle or have handled hazardous substances and hazardous waste, as those terms are defined at Section 101(14) of CERCLA, 42 U.S.C. §9601(14) and pursuant to the above referenced Articles of the ECL.

Section 104(e) of CERCLA, 42 U.S.C. §9604(e), enables EPA to request relevant information or documents relating to the nature and quantity of hazardous substances or pollutants or contaminants which have been or are generated, treated, stored or disposed of at a facility or transported to a facility.

ECL Sections 3-0301(2)(f), 17-0303(7), 19-0301, 27-0915(1), 27-1307, 27-1309(1), 37-0105, and 40-0109(1)(b) and (2), and the rules and regulations promulgated pursuant thereto, also enable DEC to request relevant information or documents relating to the nature and quantity of hazardous substances, hazardous wastes or

pollutants or contaminants which have been or are generated, treated, stored or disposed at a facility or transported to a facility or a hazardous waste site.

Pursuant to these statutory provisions, EPA and DEC hereby require that you answer the questions asked in the enclosed "Request for Information" letter. If your company has an EPA Identification Number, kindly state it in your response.

Your response to the "Request for Information" should be postmarked or received by EPA and DEC within thirty (30) calendar days of your receipt of this letter. Your response should be mailed to:

Mr. William Daigle, P.E.
Chief, Special Projects Section
N.Y.S. Department of Environmental Conservation
50 Wolf Road
Albany, NY 12233-7010

with copies to:

Mr. Herbert H. King
Remedial Project Manager
U.S. Environmental Protection Agency
290 Broadway, 20th Floor
New York, NY 10007-1866
(212) 637-4268

and

TAMS Consultants, Inc.
Attn: James P. Behan, P.E.
400 Clifton Corporate Park
Suite 402
Clifton Park, NY 12065

Copies of the transmittal letters (without any enclosures or attachments) should also be mailed to:

George A. Shanahan, Esq.
Assistant Regional Counsel
U.S. Environmental Protection Agency
290 Broadway, 17th Floor
New York, NY 10007-1866
(212) 637-3171

and

William G. Little, Esq.
N.Y.S. Department of Environmental Conservation
Onondaga Lake Enforcement Project
50 Wolf Road
Albany, NY 12233

Your failure to respond to the "Request for Information" within the time specified above may subject you to an enforcement action under Section 104(e)(5) of CERCLA, 42 U.S.C. §9604(e)(5) and/or the relevant provisions of Article 71 of the ECL. An enforcement action may include the assessment of penalties of up to $25,000 for each day of continued noncompliance.

Your notarized signature must appear on the enclosed "Certification of Answers to Request for Information," which should be attached to the response to this "Request for Information."

Please be advised that you are under a continuing obligation to supplement your response if information not known or not available to you as of the date of submission of your response should later become known or available. If at any time in the future you obtain or become aware of additional information and/or find that any portion of the submitted information is false, misleading or misrepresents the truth, you must promptly notify EPA and DEC. If any part of your response is found to be untrue, you may be subject to criminal prosecution.

If desired, you may assert a business confidentiality claim covering all or part of the information requested by this letter. The claim must be supported by each of the four factors specified in Section 104(e)(7)(E) of CERCLA, 42 U.S.C. §9604(e)(7)(E), and regulations set forth in 40 C.F.R. Part 2, Subpart B, and in accordance with those criteria as established pursuant to ECL Sections 17-0303(7), 19-0305(2)(a), 27-0919, 27-1311, 37-0105, 40-0109(1)(b),(2) and paragraph 2(d) of Section 87 of the Public Officers Law of the State of New York and the rules and regulations promulgated pursuant thereto, and must be asserted at the time of submission by placing on (or attaching to) the information a cover sheet stamped or typed legend or other suitable form of notice employing language such as "trade secret," "proprietary" or "company confidential."

Information covered by such a claim will be disclosed by EPA or DEC only to the extent and by means of procedures set forth in Title 40 C.F.R. Part 2, Subpart B or the above-referenced Sections of the ECL and in accordance with the applicable provisions of the Public Officers Law of the State of New York, respectively. If no such claim accompanies the information when it is received by EPA and DEC, it may be made available to the public by EPA and DEC without further notice to you.

If you have any questions concerning this "Request for Information," please contact Mr. Daigle at (518) 457-1741, or Mr. Little at (518) 457-3296. Please direct all communications from an attorney to Mr. Little. Communications specifically addressing issues of federal law should be raised with Mr. Shanahan at (212) 637-3171.

Your cooperation is appreciated.

Sincerely yours,

for Kathleen C. Callahan
Director
Emergency and Remedial
Response Division
USEPA Region II

Michael J. O'Toole, Jr.
Director
Division of Hazardous Waste
Remediation
NYSDEC

Enclosures

INSTRUCTIONS FOR RESPONDING TO REQUEST FOR INFORMATION

1. A complete response must be made to each individual question in this Request for Information. Identify each answer with the number of the question to which it is addressed.

2. In preparing your response to each question, consult with all present and former employees and agents of your company who you have reason to believe may be familiar with the matter to which the question pertains.

3. In answering each question, identify all contributing sources of information.

4. If you are unable to answer a question in a detailed and complete manner or if you are unable to provide any of the information or documents requested, indicate the reason for your inability to do so. If you have reason to believe that there is an individual who may be able to provide more detail or documentation in response to any question state that person's name and last known address and phone number and the reasons for your belief.

5. For each document produced in response to this Request for Information, indicate on the document, or in some other reasonable manner, the number of the question to which it applies.

6. If anything is deleted from a document produced in response to this Request for Information, state the reason for, and the subject matter of, the deletion.

7. If a document is requested but is not available, state the reason for its unavailability. In addition, to the best of your ability, identify any such document by author, date, subject matter, number of pages, and all recipients and their addresses.

8. If you cannot provide a precise answer to a question, please approximate, but in any such instance, state the reason for your inability to be more specific.

9. Whenever in this Request for Information there is a request to identify a natural person or an entity other than a natural person, state, inter alia, the person or entity's full name and present or last-known address.

10. The terms "and" as well as "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of these questions any information which might otherwise be construed to be outside their scope.

11. As used herein, the term "hazardous substance" shall have the meaning set forth in Section 101(14) of CERCLA, 42 U.S.C. §9601(14). The substances which have been designated as hazardous substances pursuant to Section 102(a) of CERCLA (which, in turn, comprise a portion of the substances that fall within the definition of "hazardous substance" under Section 101(14) of CERCLA) are set forth at 40 CFR Part 302.

12. As used herein, the terms "hazardous waste," "disposal" and "storage" shall have the meanings set forth in Sections 1004(5), (3) and (33) of RCRA, 42 U.S.C. §6903(5),(3) and (33), respectively.

13. As used herein, the term "industrial waste" shall mean any solid, liquid, gas or sludge or any mixtures thereof which possess any of the following characteristics:

a. it contains one or more "hazardous substances" (at any concentration) as defined in 42 U.S.C. §9601(14);
b. it is a "hazardous waste" as defined in 42 U.S.C. §6903(5);
c. it has a pH less than 2.0 or greater than 12.5;
d. it reacts violently when mixed with water;
e. it generates toxic gases when mixed with water;
f. it easily ignites or explodes;

g. it is an industrial waste product;
h. it is an industrial treatment plant sludge or supernatant;
i. it is an industrial byproduct having some market value;
j. it is coolant water or blowdown waste from a coolant system;
k. it is a spent product which could be reused after rehabilitation; or
l. it is any material which you have reason to believe would be toxic if either ingested, inhaled or placed in contact with your skin.

14. As used herein, the term "Onondaga Lake Site" or the "Site" shall refer to the Onondaga Lake located in the city of Syracuse and in the towns of Salina, Geddes and Camillus, Onondaga County, New York and its tributaries.

15. As used herein, the term "Facility" shall mean your company's facility or facilities owned, controlled, or operated by your company or subsidiaries of your company and located in whole or part within a fifty mile radius of the Site in Syracuse, New York area.

16. As used herein, the terms "the company" and "your company" refer not only to your company as it is currently named and constituted, but also to all predecessors in interest of your company and all subsidiaries, divisions, affiliates and branches of your company.

REQUEST FOR INFORMATION

1. a. State the correct legal name and address of your company.

b. Identify the state of incorporation of your company and your company's agent for service of process in the state of incorporation and in New York.

2. State the name(s) and address(es) of the President, the Chairman of the Board and the Chief Executive Officer of your company.

3. If your company is a subsidiary or affiliate of another corporation, or has subsidiaries, identify each such entity and its relationship to the company, and state the name(s) and address(es) of each such entity's President, Chairman of the Board and Chief Executive Officer.

4. List all of your facilities which generated, handled, transported, treated, stored or disposed of hazardous substances, hazardous wastes, or industrial wastes which are, or were formerly, located within fifty miles of any point along the shoreline of Onondaga Lake. For each such facility, state its name and address, and period of operation. Please identify any of your facilities that are no longer in operation within this area.

5. Indicate the nature of the operation for each facility identified in Question 4 above. If the operations changed, indicate the nature of those changes (including any name changes) and the dates the changes took place.

6. For each facility identified in your response to Question 4 above, provide a detailed process/mechanical description of the processes used, the wastes generated from such processes, and the volume or weight of such wastes. If the process and/or waste stream changed, indicate the nature of the changes (including volumes) and the dates the changes took place. For each such waste stream provide any analyses that you have of the chemical composition of the waste stream.

7. Explain in detail the manner of transportation or disposal of the hazardous wastes, hazardous substances and industrial wastes generated, handled, treated or stored at the facilities identified in your response to Question 4 above. Provide a separate response for each facility identified in your answer to Question 4 above.

8. For each type of hazardous waste, hazardous substance, and industrial waste material listed above, provide the names and addresses of all transporters and disposal facilities used, and state when each such transporter and disposal facility was used.

Please identify the total volume or weight of such material that was transported by that entity or individual to each such disposal facility.

9. State whether any hazardous substance, hazardous waste or industrial waste, as those terms are defined in Instructions 11-13, was ever released or discharged into the environment at your facility. If yes, provide the following information

a. If this was a continuous or intermittent practice or event, identify the period of time during which this practice or event occurred and the hazardous substances and the quantity that was released or discharged and to where it was discharged. (In addition to a description of the discharge location, the discharge location should be shown on a map of the area and enclosed with your reply).

b. If there was no continuous or intermittent practice or event of release or discharge, specify the date of each incident, the hazardous substances and the quantities that were released or discharged.

c. If any of the hazardous substances released would have entered either directly or indirectly (e.g. through surface runoff or groundwater migration) into Onondaga Lake or its tributaries, please provide the path of release.

10. Was any of the material described in your response to Question 9 treated prior to direct discharge into the Lake or its tributaries, or pretreated prior to discharge into a municipal sewerage system which discharges to the Lake or a tributary to the Lake? If so:

a. describe the treatment or pretreatment process and capacity and whether discharges were continuous or intermittent;

b. the years during which treatment or pretreatment occurred, including date treatment or pretreatment began and whether discharges continue or date of cessation of discharges if discontinued;

c. the quantities of influent waste treated or pretreated;

d. the quantities and composition (chemical analysis) of treated or pretreated material discharged;

e. whether the material was discharged directly into the Onondaga Lake, a tributary of the Lake or into a municipal sewerage system which discharges to the Lake or a tributary of the Lake;

f. how you disposed of any sludges or residues generated by the treatment or pretreatment process; and

g. provide the location of discharge and, if applicable, the name of municipal sewerage system to which discharge was made.

11. Identify all persons and other entities, including yourself, who determined how to treat, store, and/or dispose of hazardous wastes, hazardous substances, and industrial wastes generated at the facility. Provide the names and current addresses of all individuals who participated in such determinations.

12. Identify all of the sources of the information contained in your answers to questions 6-10. Provide copies of all documents that relate to your answers including, but not limited to invoices, manifests, hazardous substances, hazardous and industrial waste data and analyses or characterizations and contracts, or agreements with transporting, treatment, storage or disposal facilities.

13. Provide copies of applications for Refuse Act Permit Program, National Pollutant Discharge Elimination System Permits, and State Pollutant Discharge Elimination System Permits, including any waste analyses or characterization submitted with such applications. Provide copies of all permits issued and all amendments to said permits. Provide copies of all Notices of Violations, or administrative or judicial complaints, concerning such discharges submitted or filed by federal, state, county or municipal governments and their regulatory agencies as well as copies of all judicial complaints filed by other persons (including corporate or partnership entities or public interest groups).

14. Identify any current or previous insurance policies that may indemnify you or your company against any liability that you or any entity may incur in connection with the release of any hazardous substances and/or hazardous wastes at the Site. Please provide a copy of the policy. For any policy that you cannot locate or obtain, provide the name of the carrier, years in effect, nature and extent of coverage, and any other relevant information you have.

15. Supply any additional information that may be used to identify additional sources of information or parties involved with the Site.

16. State the name, title, and address of each individual who assisted or was consulted in the preparation of the response to this "Request for Information" and specify the question to which each person assisted in responding.

Mr. OXLEY. I thank the gentleman from New Hampshire and salute his leadership on this issue. His reputation is well known about dealing with this issue for a number of years, and we appreciate the gentleman being here and testifying.

Mr. ZELIFF. Thank you, Mr. Chairman.

Mr. OXLEY. Chairman McIntosh.

STATEMENT OF HON. DAVID M. McINTOSH

Mr. MCINTOSH. Thank you, Mr. Chairman. First, let me associate myself with the remarks of my colleague Mr. Zeliff who I am honored to be here testifying with. His leadership on this issue has been an inspiration and one that has been very helpful.

Also, let me commend you and all of the committee for taking up this very important issue and moving forward expeditiously in a reform project that is long overdue.

I have a longer written statement that I will submit for the record, but let me summarize what I think are the key points for the committee to keep in mind as you move forward with this effort.

First of all, I think we should all acknowledge that Superfund has been a failure. It has failed the environment because it has been terribly slow in cleaning up many of the waste sites. It has failed workers who have lost their jobs because plants have been shut down when they have been unable to clean up sites and rejuvenate those areas and make them economically productive. It has failed in terms of saving resources that the taxpayer will pay for ultimately because of the quagmire that is created with retroactive liability and a system that is not only unfair but horribly inefficient.

The only group that I can identify who actually is a winner out of this legislation are the lawyers who end up making millions of dollars representing clients who are avoiding cleaning up the environment, lawyers in the government who spend hours and hours going through paperwork, spending resources that could again be used in cleaning up very hazardous areas and protecting our environment.

I think one of the key things that we need to look at, as Mr. Zeliff mentioned, is the fact of retroactive liability. The first point is one that he made very well, that it is in fact un-American and flies in the face of our tradition of Anglo-Saxon jurisprudence. We are asking people to be held liable for acts that they neither committed nor were at the time prohibited by government regulations. That scheme in itself is inherently unfair and traps people in a liability regime which in any other context we would clearly reject in this country.

Second, the liability scheme has diverted billions of dollars from actual efforts to clean up the environment. The record is dismal. When you only have 15 percent of the sites where they have actually had a chance to clean them up out of the more than 1,300 sites that are on the list, we have to acknowledge that the system is fundamentally flawed.

This diversion of resources into an area where it is not helpful to the environment is, frankly, something that the American people have asked us to change and to do a better job on in this Congress.

I want to commend this committee again for taking up this issue and working to make sure that the resources that we do spend in the government program and the resources that we ask the private sector to spend in cleaning up these hazardous waste sites are used to the maximum extent possible to accomplish that goal.

Let me mention a couple issues that I think are also very important as you consider the changes in Superfund. One of the things that I think would be very important to do is to create incentives for the Agency to focus its priorities on going after those sites with the greatest amount of risk, and having a defined budget implemented by EPA is probably the most important way of accomplishing that goal rather than creating a situation where all sites are addressed on an equal priority and people are diverting resources in order to avoid having many of them cleaned up.

Finally, another issue that came to my attention was when Larry Lindsey, one of the Board of Governors of the Federal Reserve System, had a colloquium here on Capitol Hill where he brought several people who had been working in the inner city to rejuvenate those areas.

They testified along with their bankers who had provided them funding in helping to rejuvenate and make economically viable blighted areas in the inner city that one of the problems they had was with the environmental liability scheme under Superfund, that if they identified an area that was a potential Superfund site it was impossible to attract resources in or near that area in order to make it economically viable once again.

They described one situation where there had been some hazardous waste on one location and they simply closed it down, chose to paint over the outside of the building and pretend that it didn't exist in order to allow the rest of the neighborhood to be reconstructed and put back to economically viable uses.

Unfortunately, that doesn't serve us well for the environment. What we need is a way that goes in and actually secures a fair and equitable and efficient cleanup of those areas so that we can once again rejuvenate the inner city areas that have been blighted disproportionately by past economic activity.

Finally, I think that will give us an environmental bonus. We won't have as great an incentive to go out and look at greenfields in the countryside in order to develop new and expanded economic opportunities because we will have more areas available to us in the inner city.

Let me close by saying I urge you very strongly to fully eliminate retroactive liability so that this Congress can go back to the American people and say we have reformed Superfund and we have done it in a way that we think will actually be better for the environment than the existing program because we're going to focus our effort on cleaning up these hazardous waste sites and not diverting 60 to 70 percent of the resources into legal fees, consultant fees, and efforts to avoid cleanup activity.

Thank you very much, Mr. Chairman, for letting me appear today before you.

[The prepared statement of Hon. David M. McIntosh follows:]

PREPARED STATEMENT OF HON. DAVID M. MCINTOSH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF INDIANA

Good morning. Mr. Chairman and Members of the Committee, thank you for the opportunity to present my views on the reauthorization of the Superfund program. However before I begin, I wish to commend the Chairman on his very well-crafted bill. This legislation contains many necessary reform measures, such as those addressing remedy selection, brownfields cleanup, the delegation of federal Superfund program authorities to the States. I wholeheartedly support these efforts.

FUNDAMENTAL REFORM IS NEEDED

On one point, I know that everyone agrees—the current Superfund program has failed. It has failed the environment, failed workers who have lost their jobs, failed citizens who have thrown good money down the rat hole to pay for lawsuits and studies, never to see real environmental cleanup. Superfund is an extremely wasteful and ineffective program in dire need of reform. We gravely need a new law that is fair, speeds clean-ups of high priority toxic waste sites, restores contaminated lands to productive uses, eliminates wasteful lawsuits, focuses on protecting public health and the environment, and reduces costs across the board.

The current program's record speaks for itself. After 15 years, less than 15% of some 1,354 sites on EPA's National Priority List have been cleaned up and removed; yet, the work has cost the government and private sector over $60 billion.

According to current estimates, the average cost of cleanup at a NPL site is $30.7 million and it takes 12 years to clean up the average site.

Out of over $4 billion spent annually on Superfund, only about $2 billion is spent on actual clean-up. A study by the National Strategies, Inc. found that, in 1984, transaction costs (lawyer and consultant fees) for the public and private sectors totalled $1.34 billion, while about $1.47 billion of cleanup funds were raised from Potentially Responsible Parties. Thus, it took 90 cents to raise every dollar in cleanup funds.

In short, the current system for hazardous waste cleanup is fundamentally flawed. The only people who benefit from the current Superfund program are the lawyers in the Justice Department and law firms who will be out of jobs when this Congress revamps the law. However, the biggest losers under this system have been the environment, small business, urban areas, and local taxpayers.

RETROACTIVE LIABILITY

One of the most destructive elements of the current Superfund structure is retroactive liability. Superfund's punitive liability scheme generates endless legal battles, costs jobs, hurts competitiveness, and harms the inner city.

First and foremost, retroactive liability is un-American and antithetical to this country's most cherished legal and ethical principles. Retroactive liability holds people and firms responsible for the past actions of others. In fact, these actions were lawful when taken. It is grossly unfair to brand parties as "polluters" when they were not responsible for creating hazardous waste, or they acted in good faith in accordance with federal, state, and local law. This approach undermines respect for the law and the regulatory program.

We are all familiar with horror stories about the impact of Superfund's punitive liability system on law-abiding businesses. Since its enactment, Superfund has cast a wide net across thousands of small and medium-sized businesses, community groups, and other organizations in the United States. The current system of retroactive, strict, joint and several liability encourages EPA to go after every entity or person with even the most remote connection to a Superfund site. As a result, the current system has spawned inordinate legal fees and transaction costs. It has delayed cleanups for decades, and left individual sites standing contaminated and abandoned.

REPEAL OF RETROACTIVE LIABILITY IS A NECESSARY COMPONENT OF SUPERFUND REFORM

I believe that a comprehensive approach to reform is essential—one that addresses all of the fundamental flaws in the current program. Therefore, to achieve real reform, it is crucial that retroactive liability prior to 1987 be eliminated. Without fully repealing retroactive liability, the unfairness and inefficiencies inherent in the present system will endure. Stated differently, full repeal would accomplish the objectives of reform most effectively. In particular, full repeal would have the following positive effects:

• Speed of Cleanups—Full repeal would significantly accelerate the pace of cleanups by removing the current fundraising system's disincentives to speedier cleanups. Experts estimate that eliminating retroactive liability before 1987 would end litigation and financing disputes at 80% of the NPL sites. That means that in a matter of years, we can go from a dismal .150 batting record to well over .800.

• Transaction Costs—Experts have indicated that repeal would lower overall transaction costs by 77%, while reducing the overall cost to the economy by $1.8 billion. Assuming the level of cleanup funding remains the same, eliminating endless disputes over cleanup costs would free up money for actual cleanups.

• Risk-Based Cleanup—Eliminating the current site-specific fund-raising system and establishing an annual budget for Superfund would provide EPA the incentive to focus on cleaning up sites that pose real risks. In a recent report, the General Accounting Office states that only 25% of the 600 sites studied presented real risks based on current land uses. The current fundraising scheme encourages the cleanup of sites that pose little risk to human health and safety, diverting limited resources away from high priority hazardous waste sites.

• Redevelopment in Urban Brownfields—Full repeal would help the inner city. We must spur the return of polluted, unproductive, non-taxable site to productive areas where inner city neighborhoods have a chance to recover. Under the current program, the risk of becoming liable for historic pollution causes developers to leave available urban land undeveloped, unproductive, and a drain on the local government. It also encourages the rapid development of greenfields, such as farm land and forests.

• Fairness—Full repeal would benefit all stakeholders. It would avert in-fighting between industry sectors over who will become winners and losers with changes in the law.

FUNDING FULL REPEAL REFORM

The Republican Congress must be aggressive in searching for ways to fund full repeal. Until all vestiges of retroactive liability are removed, we cannot truly say we are pursuing the most effective course of action.

We, as freshman Members of Congress, were elected with a mandate to put an end to the inefficiencies and inequities of laws such as Superfund and we are committed to do just that. We support the efforts of this Committee to lead the way. It is my hope that in the coming weeks, we in the House will determine a way to pay for eliminating retroactive liability and to refocus Superfund on the protection of human health and the environment.

This is an opportunity for win-win reform: (1) Cutting burdensome regulations and removing thousands of lawyers from the process; and (2) Helping the environment by speeding up cleanup of toxic waste sites.

I understand that this committee believes that there is a shortfall or "funding gap" of about $700 million between the amount of revenues for the Superfund program and the costs of the full repeal. All potential sources of revenue should be fully explored and taken into account in a full repeal program's budget. In particular, I urge you to examine potential savings from cutting the "core program," fundamental contract reform, and reformed remedy selection at federal NPL sites.

I also earnestly urge this committee to work with all key committees in the House to cross the jurisdictional walls created by budget rules in order to structure financing mechanisms that will assure that funds raised for the Superfund program are targeted for this purpose and that sufficient funds are appropriated for full repeal reform.

Many of these reforms will "pay" for themselves by bringing productive enterprises back into the economy. But we cannot score these benefits by traditional CBO methods. This committee has had tremendous success recently in dealing with a similar situation in Medicare. One possibility would be to borrow Speaker Gingrich's idea of a "look-back" provision that would be triggered if there are not sufficient funds to increase cleanups. This would fund the scoring for full reform and create incentives for industry to cooperate in expediting cleanups.

Mr. OXLEY. Thank you, Chairman McIntosh. We thank both of you.

Are there questions for the panel before we proceed to opening statements?

[No response.]

Mr. OXLEY. Again we thank both gentlemen for appearing before the subcommittee.

Mr. Zeliff.

Mr. ZELIFF. Mr. Chairman, one of the things that obviously you have to wrestle with is, do we do full repeal and is it right? I think the answer is yes.

I urge you to do everything you can possibly do as you fight the battle of proving your case on full retroactivity reform to utilize the fact that there will be savings as we do the reform and we take out the liability scheme. On a most conservative basis, there will be savings of 35 percent.

Somehow we need to be given credit for the reform that takes place and the savings that take place. Let's not let the technicalities of the system hold us back from doing the right thing, because we are talking about something that really is un-American and wrong and flawed and needs to be changed.

Mr. MCINTOSH. Mr. Chairman, if I might add to that. One of the things that I featured in my written testimony is that the committee has had a great deal of experience in the Medicare area of dealing with a similar problem where the scoring mechanism didn't allow us to adequately count the savings, and the use of a look-back provision was one way in which those savings were achieved for budget purposes. You may want to consider applying the expertise the committee has in that area to this problem as well.

Mr. OXLEY. The gentleman from Louisiana.

Mr. TAUZIN. Thank you, Mr. Chairman.

I thank both of you, first of all, for excellent testimony. Chairman McIntosh, you mention at the very end of your written testimony the possibility of a look-back provision in regards to the repeal of retroactive liability. Can you elaborate just a little bit on your concept of how it might work?

Mr. MCINTOSH. My thought on that was that if the problem is making sure that we have adequate funding to cover the government resources, and we anticipate that there are 35 percent savings that Mr. Zeliff had mentioned on that, that if we don't in fact achieve that degree of savings, that the committee could look at an additional funding mechanism perhaps of the pool of potentially liable parties and say this will become effective in the next year to make up for that funding shortfall where we don't achieve those efficiency savings that we anticipate by removing the liability scheme.

Mr. ZELIFF. In a discussion with some of the folks that would be involved, I think you would probably get a fairly positive reaction. It just seems to me that there are options out there that we need to explore if in fact we are all committed to doing the right thing. If it is the right thing, why revisit this thing 2 years from now? Let's just do it once. We have got many, many opportunities ahead and different challenges. Let's get this one behind us; let's get life moving; and let's stop doing the tragic thing to Americans that we are doing right now if it's that wrong.

Mr. MCINTOSH. Mr. Chairman, I might also add that I think one other advantage of a look-back provision would be you would create real incentives for people to actually accomplish the cleanups in order to be able to avoid that. It could be structured in a way to further enhance the incentives for real activity in this area.

Mr. ZELIFF. If you add that piece to your bill, you've got a real winner.

Mr. OXLEY. Thank you both.

Mr. MCINTOSH. Thank you, Mr. Chairman. Thank you again for your hard work on this.

Mr. OXLEY. The committee will now proceed with opening statements. The Chair will recognize himself.

Today the subcommittee will hear testimony from EPA Administrator Carol Browner, other officials in the administration, and numerous others, chiefly on what is perhaps the most troubling aspect of the Superfund program, its liability provisions.

Often termed a polluter pays system, it is far from it. It's a society pays system, plain and simple. We are here to change that and change that dramatically.

Everyone involved in the Superfund reauthorization debate shares a common goal, getting National Priorities List sites cleaned up fast and cleaned up effectively to remove threats to human health and the environment.

In the 15 years since its enactment, however, CERCLA has been a miserable failure, in large measure because the statute forces all stakeholders, whether Federal and State governments, potentially responsible parties, or insurance companies, to devote vast resources to litigation rather than cleaning up sites. Fifteen years of the blame game is enough, and I am determined to end it as soon as possible.

H.R. 2500, the legislation I introduced last week with bipartisan cosponsorship, will dramatically improve the way we respond to the threat of environmental contamination.

The Reform of Superfund Act mandates three fundamental changes to the current liability system.

First, fairness. ROSA will take over 200 municipal solid waste sites and literally tens of thousands of PRP's out of the Superfund liability web on the date of enactment. Litigation at these sites ends. No more lawyers. Only cleanups. ROSA also provides significant relief to small business by providing an exemption for parties that sent 1 percent or less of the waste to a Superfund site.

Second, incentives to clean up. The subcommittee has heard all year about the fundamental unfairness of retroactive liability. In my "Principles for Superfund Reform" released in July, in fact I argued in favor of repeal of Superfund liability for activities that occurred prior to 1987.

Although our efforts to ensure adequate funding for a full repeal have proven unsuccessful to date, we have included in H.R. 2500 an enormous incentive for parties to conduct cleanups rather than litigate. We have provided for a retroactive liability discount or RLD that says to parties, clean up the site no matter how unfairly liability has been imposed against you, but when you do clean up the site the Superfund will pick up half the tab. The RLD thus provides enormous incentives for parties to fund cleanups without delay. Again, no more lawyers, just cleanup.

Third and finally, fast track, fair share allocation. ROSA will implement a system whereby a neutral allocator will quickly and fairly determine the relative equitable shares of liabilities for PRP's at multiparty sites. Rather than playing out Superfund disputes in al-

ready overburdened Federal courts with all the attendant costs of litigation, parties will be able to get quick justice and get out of the Superfund system. The lawyers go home and the cleanups are completed.

Who benefits from these liability reforms?

First and foremost, the environment. Cleanups will simply take place quicker, allowing land to be placed back into productive use.

Second, the American taxpayer. Because the reforms streamline the liability process, more money can go toward cleanups and less to lawyers. Ultimately that means we all pay less for cleaning up the environment.

Third, Superfund stakeholders. There simply can be no question that ROSA will treat all responsible parties, everyone from the small business to Fortune 500 companies to the insurance industry, much more fairly than under current law or any other Superfund reform proposal that exists today.

We will also be hearing from the administration regarding cleanups at Federal defense facilities where we are likely to save American taxpayers hundreds of millions of dollars through common sense remedy selection reform, among other items.

Our last panel of the day will address natural resource damages, an area of the Superfund program also in need of significant reform.

I will be very interested in hearing from our witnesses today, particularly from the administration, as to why the reforms we have put forward in H.R. 2500 will not dramatically improve the implementation of cleanups across this country. The burden is squarely on those who oppose this legislation to explain why we are not going to get Superfund sites cleaned up more effectively, more efficiently and more expeditiously. ROSA is going to do precisely that.

The time of the Chair has expired. I now turn to the ranking member of the subcommittee, the gentleman from Oregon, Mr. Wyden.

Mr. WYDEN. Thank you very much, Mr. Chairman. I want to make very clear at the outset that I and the minority looks forward to working with you to produce a bipartisan bill to deal with this critical issue.

The Superfund program suffers, in my view, from a wide variety of ills, but the remedies prescribed by the Reform of Superfund Act are often worse than the disease.

For example, ROSA's response to the legitimate concern that small businesses and nonprofit organizations have improperly been caught up in the Superfund liability net is to essentially throw overboard the polluter pays principle. This principle has effectively ensured that hazardous substances are handled under the most stringent safeguards instead of being dumped on the ground, as has often been the case in the past.

Instead of cleaning up and protecting groundwater for drinking water and other uses, ROSA would play Russian roulette with the drinking water supplies of many Americans and allow contamination to spread unchecked.

Instead of reforming the current program so that more Superfund dollars will be spent on actual cleanup than is spent on lawyers, ROSA creates new opportunities for litigation.

Instead of empowering States with successful cleanup programs to run their own program, ROSA would essentially put the States into a Federal straightjacket by requiring adoption of one size fits all Federal remedies and liability standards as the price for receiving Federal funds.

Instead of providing faster cleanups at lower cost, ROSA would almost always prefer that a toxic mess be covered over rather than cleaned up.

But what counts is, are there constructive alternatives?

The fact is my home State of Oregon offers another possible road map to achieving comprehensive reform of Superfund. Oregon's Republican controlled legislature rocently passed and our Democratic Governor signed into law a major reform of our State's Superfund law that went forward on a bipartisan basis.

While Oregon's reform measure bears many similarities to several features in the ROSA legislation, there unfortunately are a number of key differences.

Like ROSA, Oregon's law originated as an industry sponsored bill but it evolved to become a collaborative effort involving Oregon's Department of Environmental Quality, environmental and citizens' groups.

Like ROSA, Oregon's law allows contamination to be addressed through containment, but the remedy selection process isn't slanted in favor of containment through an overemphasis on cost-benefit analysis and cost factors.

Oregon's law also retains an explicit preference for treatment of hot spots that pose risks to human health or the environment after taking into account land use. ROSA eliminates this preference for treating hot spots.

Oregon's law requires protection of all beneficial uses of water, including drinking water, agricultural and industrial use and other systems for protecting the environment. Under ROSA, individuals and communities would bear the burden of proving in court that their water uses should be protected, and even local decisions to use groundwater as drinking water could be overturned.

Last but certainly not least, Oregon's law retains explicit health-based criteria for protection of human health. ROSA omits this essential public health safeguard.

As the Congress takes up Superfund reform it is critical to keep in mind that many contaminated sites still pose serious public health risks to millions of our citizens. These sites ought to be cleaned up. They shouldn't be swept under a giant rug where they remain toxic time bombs for unsuspecting citizens in our communities.

A prime example is the Hanford Nuclear Reservation, a site considered to be the most pollutod place in the Western Hemisphere. Because the deadly radioactive wastes that contaminate the site will take hundreds of years to decay, a containment approach would leave the residents of the surrounding communities and the 1 million poople who live downstream from Hanford at risk for generations to come.

The East County groundwater contamination site in my district is another site where containment is no solution because this approach would cut off the city of Portland's ability to use its backup drinking water source in a water supply emergency.

Before the subcommittee goes forward and performs radical surgery on Superfund, let us at least on a bipartisan basis get a second opinion.

Because Chairman Oxley has graciously agreed to invite the director of the Oregon Department of Environmental Quality, Langdon Marsh, to testify, this subcommittee is going to hear that there is an appropriate way to remedy the flaws of Superfund without removing the law's teeth. Mr. Marsh not only worked to reform Oregon's Superfund law, he also had firsthand experience with Love Canal as an official of the New York State Department of Environmental Conservation for more than 20 years.

I urge my colleagues to listen carefully to the testimony of Mr. Marsh, because in my view it provides a freeway to bipartisan reform of this important law.

Mr. Chairman, I thank you and look forward to working with you.

Mr. OXLEY. I thank the gentleman.

The gentleman from Idaho, Mr. Crapo.

Mr. CRAPO. Thank you, Mr. Chairman. I thank you as well as the committee for holding these hearings on the recently introduced legislation on CERCLA, H.R. 2500. What we accomplish with this bill will have a significant impact on the State of Idaho, and I am prepared to work with all parties to ensure that we complete the best piece of legislation possible.

Mr. Chairman, your bill makes significant progress toward a Superfund mechanism that is responsive to community desires and State authority without bankrupting local communities. Citizens, State and local governments and industry all stand to benefit.

However, as a representative whose State has significant mining interests, I am still concerned that there are areas of H.R. 2500 that can be improved. Last week I spoke about Triumph, Idaho and the problems that it had with the EPA and its hazard ranking score due to presumed lead levels. I want to reiterate the points that I made then.

EPA's lead and soils policy, in my opinion, is fundamentally flawed. While the remedy selection provisions are improvements over current Superfund legislation, the language in H.R. 2500 does not effectively address the EPA's soil removal policies nor its use of the unvalidated lead model. I intend to use this hearing as well as other opportunities to further explore this issue and EPA's policies.

I am also concerned with the natural resource damages provisions of H.R. 2500. When Superfund was first established the congressional intent was that natural resources damages be prospective only. The bill that we pass out of the House needs to clarify that congressional intent.

The current language does not establish non-retroactive application of NRD for either restoration damages or compensatory damages. Trustees still maintain the ability to argue for restoration of

natural resource functions that are not linked to the public services provided by the natural resource.

Finally, I am concerned that the $50 million cap on claims harbors the potential for loopholes.

If these and other problems are not remedied, the meaningful changes the bill does make in cleanup liability and cleanup standards will fail to drive down the costs and get the parties out of the courthouse. Instead, regulators will simply shift their demands for unnecessary and costly cleanups to demands for excessive and costly natural resource restoration damages and compensation.

Without significant changes to the current lead and soils policy in the natural resource damages provisions in the current Superfund regulations, we run the risk of offsetting the positive changes that we have made with continued litigation and exorbitant costs that could bankrupt companies and continue to shut down communities.

I would like to make one other comment that was prompted by the remarks of the gentleman from Oregon as he mentioned the Hanford site. There has been some discussion in the media recently in my State about the fact that the Senate bill contains the possibility of an exemption or a loophole for Federal agencies being required to comply with CERCLA. We addressed this issue last Congress. I believe that the bill we now have before us addresses it properly, and whatever we do, we should make certain that all Federal agencies be required to comply with this law just as any other parties in the United States.

I thank you, Mr. Chairman.

Mr. OXLEY. I thank the gentleman.

Mr. OXLEY. The gentlelady from Oregon.

Ms. FURSE. Thank you, Mr. Chairman.

I have a pretty simple philosophy when it comes to issues like Superfund. It's one my mother taught me; I taught it to my children. If you make a mess, you clean it up, and don't expect someone else to pick up after you. Those were the things I taught my kids. You know, Mr. Chairman, I don't think you can get fairer than that, and I certainly think that that is very, very American.

When I look at the bill before us today I have some very serious concerns. It seems to me that this bill will take us from the polluter pays concept to pay the polluter. Since there just isn't an extra amount of money this year in the treasury, this means we will have fewer and slower cleanups, and that is something that my constituents and I don't want to have happen.

I am also worried that H.R. 2500's remedy selection measures will fail to protect the health of sensitive sub-populations. That includes children and unique groups such as Native American tribes. This bill emphasizes cost over cleanup, and it will force EPA to choose bottled water, fences and guard dogs rather than actual cleanup and economic revitalization.

The provisions on groundwater are particularly disturbing to me. I know first hand about the hazards of polluted groundwater. The Portland area which I represent with my colleague Ron Wyden has had to scramble to find additional water sources because its well fields have become a Superfund site.

I am also concerned that under the guise of States' rights H.R. 2500 is really handing States an unfunded mandate while simultaneously preempting the standards that States themselves have chosen to protect their residents.

I think that this bill will continue to be a lawyer's dream statute. There are lots of places for lawsuits in this new bill.

Last but not least, I have a particular concern over the bill's natural resource damage provisions. The Pacific Northwest is a region in the country that is heavily dependent on natural resources for our economic vitality. Any damage to these resources results in direct financial costs to the livelihoods of my constituents, and in particular our region's salmon runs, and the commercial and sports fisheries which depend on those runs have been hammered by habitat degradation, including contamination by mining operations and chemical spills.

I would like to add, Mr. Chairman, that I think it is most unfortunate that we have no tribal representative present today. I understand that one was invited but because there was so much uncertainty on the schedule of this hearing the Umatilla Tribe was not able to make the schedule. Tribes are particularly impacted because their communities are affected nationwide. I ask, Mr. Chairman, for your unanimous consent to enter into the record the letter from the Chairman of the Umatilla Tribe from Oregon who speaks of his concern on this issue.

Mr. OXLEY. Without objection.

[The letter and attachments referred to follow. The Scoping Report is retained in the Commerce Committee files.]

CONFEDERATED TRIBES,
UMATILLA INDIAN RESERVATION,
Pendleton, OR

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Subject: CTUIR Review of DOE Risk Report to Congress

DEAR DR. HENRY: Technical staff of the Confederated Tribes of the Umatilla Indian Reservation (CTUIR), Special Sciences and Resources Program (SSRP), have received and reviewed a copy of DOE's draft report to Congress, entitled, *Risks and the Risk Debate: Searching for Common Ground, "The First Step."* This report establishes DOE's strong endorsement of a risk-based approach to planning and decision-making about environmental management issues and for establishing remedial priorities.

In order to facilitate DOE response to and incorporation of our comments into its final report to Congress, CTUIR/SSRP staff have organized comments by major topic, with appropriate subcategories below. All paragraphs/concepts have been numbered, please respond to each identified issue or paragraph. Because many of our comments reflect overarching concerns that transcend individual issues or line-by-line discussions within DOE's report, it has not been possible in most cases to supply specific line references to DOE's draft report. Where possible, however, we have cited appropriate page or section references.

I. CTUIR SCOPING REPORT

1. CTUIR/SSRP staff remain highly concerned that DOE's proposed decision model, identified prioritization approaches, and proposed remedial strategies do not address major tribal concerns already expressed in considerably more detail in the *Scoping Report: Nuclear Risks in Tribal Communities,* and in other CTUIR/SSRP comment documents on proposed DOE activities. Given the very short comment pe-

riod allowed by DOE for this important report and other existing CTUIR/SSRP staff commitments, we are able to provide only the following general comments and outline of major tribal concerns about DOE's chosen approach. *Nevertheless,* CTUIR/SSRP technical staff strongly hope that DOE will respond in detail to the Scoping Report, as the scope and breadth of issues it raises all affect DOE environmental management planning and decisions and may have truly long-lasting impacts on CTUIR rights and interests.

2. About 200 copies of the Scoping Report have been distributed at the request of interested parties across the nation since it was first sent to DOE in late March 1995, new requests arrive almost daily. Almost five months ago, CTUIR/SSRP staff expressed in both the Scoping Report and transmittal letter the strong desire to open a dialog with DOE concerning its proposed risk-based decisionmaking process—a desire that remains unfulfilled. Although the report has been the focus of widespread discussion, CTUIR/SSRP staff have yet to receive a formal detailed response from either DOE-HQ or DOE-RL. The only formal correspondence from DOE (HQ) acknowledged receipt of the report, but implied that DOE had already 'addressed' such concerns with its recently released Risk Principles.

3. Although DOE's Risk Principles (Risk Report, Appendix A) represent a major step in the right direction of explicitly defining assumptions, uncertainties, and judgments, they still marginalize cultural values and concerns of sovereign tribal nations as simply 'factors' to be "taken into account," largely during the risk management or priority setting phases. As currently written, DOE's Risk Principles do not strongly support—or even specifically mention—the need for direct involvement of affected communities throughout the risk evaluation process, as emphasized in Building consensus. As both the Scoping Report and Building Consensus recommend, both affected communities and their values must be incorporated directly from the beginning and throughout any risk assessment program and must be evaluated no less rigorously or systematically than traditional measures of human and environmental toxicology. Moreover, risk assessments must never substitute for properly conducted values-based alternatives assessments that examine the essential basis and full range of planning options and decision goals, objectives, and strategic approaches for both the short-term and long-term.

4. With respect to references to the Scoping Report in DOE's Risk Report, the outline of general concerns presented on pages 21-22 appears at least representative, if not exhaustive. However, DOE's interpretations presented in the final paragraph (page 22) are incorrectly extrapolated somewhat beyond what our report stated; CTUIR/SSRP staff do not share DOE's enthusiastic and unqualified endorsement of risk-based decisionmaking. Contrary to DOE's interpretation stated on page 22 (lines 605-610), the true purpose of our report is much more correctly captured in the general description of resources provided in Appendix A (page A-21), an inconsistency which must be corrected.

5. In point of fact, the purpose of the Scoping Report is two-fold. First, the Scoping Report advocates reform of current risk assessment practice to include all relevant aspects of risk, including direct involvement of affected communities and their values throughout the process. Second, the Scoping Report supports the creation of overarching holistic environmental management principles and goals that will provide a more credible, technically sound, and politically defensible basis and framework for establishing cost-effective, health-protective, and culturally sustainable environmental policy in an era of fiscal constraints.

6. The Scoping Report was originally conceived as a response to inherent limitations identified in the now widely discredited CERE process and reports, which falsely separated and isolated community concerns from 'legitimate' risk evaluation methodologies by the so-called 'experts.' Early on, however, it became clear to CTUIR/SSRP staff that our report would have to cover a much broader scope of issues, concerns, and interrelationships than just CERE. In order to comprehensively define deficiencies in current risk assessment and management practice at DOE, a focus was needed on major reforms of current risk evaluation practices, and on developing new and more comprehensive ways of solving problems that meet the needs of both DOE and the communities its activities impact. Few other available reports or DOE source documents cover the breadth of tribal issues and impacts as well as institutional assumptions considered in the Scoping Report.

II. CTUIR/SSRP CONCERNS ABOUT OTHER ASPECTS OF DOE'S RISK REPORT

CTUIR/SSRP staff also identify the following aspects of DOE's Risk Report to Co :hat are problematic, inconsistent, or unprotective of tribal rights and in-

A. Definition of Terms

7. One of the chief comments tribal staff have received about the Scoping Report concerns our almost universal use of the term 'risk,' instead of properly distinguishing between 'risk,' 'hazard,' and 'injury'. CTUIR/SSRP staff now better recognize this defect. Consequently, CTUIR/SRP staff also readily recognize the major confusion and misunderstanding that results directly from the narrow distinctions DOE has made in its definitions of 'risk,' 'hazard,' and 'exposure.' As they now stand, DOE's definitions will fuel further misunderstanding because they are inconsistent with both traditional definitions of the general scientific/technical community and those of communities affected by pollution.

8. Moreover, DOE chooses to define 'risk' as the probability, rather than the likelihood of adverse consequences, which implies a level of mathematical rigor, precision, or certainty that typically does not exist. As they now stand, such definitions serve only to limit the appearance of 'risk,' protect or minimize the liability concerns of DOE as polluter, and rationalize DOE's institutional inertia to conduct as little environmental clean-up as possible. DOE must redefine the concepts of 'risk,' 'hazard,' and 'exposure' to reflect consistency with the rest of the technical community and incorporate the full scope of 'risk' or 'hazards' recegnized by local communities, as recommended in Building Consensus (p. 24, 26).

9. DOE has made the incorrect assertion that 'if there is no exposure, then there is no risk.' This extremely narrow definition creates numerous and avoidable conflicts, twisted logic, and other problems throughout the rest of the report and undermines its credibility. For example, by DOE's current definition, existing high-level waste tanks at Hanford pose no 'risk' because there is no 'exposure' pathway (an arguable point at best)—even though the DOE report identified Hanford tanks as illustrative of high 'risk' (page 47). In fact, by DOE's own definitions, the tanks constitute only a high 'hazard,' even though there is a recognized and measurable threat of explosion or catastrophic release. The omission of accident potential (among other major risk factors) from DOE's narrowly constructed definition minimizes the appearance of 'risk,' which in this case would not even exist until after a tank exploded and 'exposure' potential and pathways were realized.

B. Tribal and 'Stakeholder' Involvement

10. DOE's Risk Report quotes extensively from Building Consensus about the fundamental need for more effective and comprehensive inclusion of tribal and 'stakeholder' concerns and direct participation in all aspects of the risk assessment and management process. Some of these same concepts are cited and supported by CTUIR/SSRP staff in the Scoping Report. Ironically, few—if any—opportunities were provided by DOE-HQ and, especially, DOE-RL, for direct and meaningful tribal involvement in the development of either risk evaluation methodologies or DOE's Risk Report to Congress. This failure occurred in spite of CTUIR/SSRP staff submitting the Scoping Report directly to both DOE-HQ and DOE-RL and formal written requests to DOE-RL for involvement in risk methodology/report development by CTUIR/SSRP staff. Substantive actions must match DOE's supportive words about how essential and important tribal involvement is to credible, comprehensively based, technically sound, and politically acceptable environmental management planning and decisions.

11. DOE's planning and decision processes must fully encompass DOE's trust responsibility to tribes, its Indian Policy, its Natural Resource Trustee responsibilities under CERCLA, and historical Executive Branch commitments to establish government-to-government relations with affected tribes. These issues also should be explicitly discussed within a separate section of Chapter 2, Risk Management, Sections B, Legal Framework and Agreements, and D, Stakeholders and Tribal Participation.

DOE's process must embrace and encourage active tribal involvement and effective mechanisms must be developed so that tribally identified issues and concerns are meaningfully incorporated into and addressed by decision processes. Tribal communities have unique and valuable knowledge and experience which must be recognized to be no less valid and valuable than evaluations by the so-called 'experts,' and an open, responsive, and mutually respectful interchange process must be established and utilized in decision processes.

C. Cultural Risk

12. Where is cultural risk rigorously evaluated—or even included—in any of DOE's evaluation methods?

D. Information Sources Matrix

13. A good illustration of how DOE interprets its information sources—particularly the CTUIR Scoping Report—is provided in Figure 2.2 (page 19). This matrix (Attachment A-1) purports to illustrate the scope of selected issues addressed within each major information source utilized by DOE in the preparation of its report to Congress. For example, the CTUIR Scoping Report is portrayed as addressing only four out of twenty-three categories, whereas DOE's own RDS approach is claimed to fully satisfy all of its defined categories.

It is truly ironic that, as DOE's chart shows, only the CERE Inventory and DOE's own RDS process address the category. Stakeholders and Tribal Concerns'—a highly debatable contention in itself. But, according to DOE's own determination, a report prepared by staff of a sovereign tribal nation does not 'represent' tribal and 'stakeholder' concerns.

Such unadulterated bias is simply unacceptable and must be corrected; how many other information sources are narrowly, selectively, or otherwise inaccurately portrayed? Tribal staff have enclosed a revised version of DOE's Figure 22 (Attachment A-2) that reflects a more balanced perspective on the true range of categories addressed in the tribal Scoping Report. This comment applies also to a similar chart shown in Appendix A, p. A-57.

14. In addition, tribal staff suggest adding one additional category, namely 'Impacts of Doing Nothing,' we believe that only the Scoping Report addresses this critical issue. Major risk evaluations, such as DOE's Risk Report, and debates over use of risk in decision processes now do not consider or gloss over the true costs of inaction. The element of time and the impacts and costs of not cleaning up existing contamination to future generations currently do not enter the debate, but may in fact represent the greatest cumulative costs and impacts both in terms of dollars and health impacts. For example, it may be easy now to justify not pumping and treating contaminated groundwater, whether or not it reached the Columbia River, because either current discharges are 'below regulatory standards' or because future discharges now pose only a 'low' risk owing to limited exposure potential or pathways. The crux of the argument is that the costs of current actions exceed the perceived benefits, but in fact it represents a profound failure to provide any semblance of vision and to understand the full range, magnitude, and time span of impacts and uncertainties and how these affect future generations.

The real risks to future generations are neither understood nor predictable. In reading between the lines of Closing the Circle, the full scope of impacts from historical DOE defense production operations and resulting environmental legacy only now is beginning to become clear to the present generation and its federal budgets.

The current short-sighted and short-term perspective simply transfers environmental contamination problems to future generations. For example at Hanford, the inevitable spread and commingling of existing contaminant plumes necessarily will result in further degradation of groundwater resources, Columbia River water quality, and associated health, natural resource, and cultural impacts. Future options are prejudiced because our children are being forced to bear the increased remedial complexity and costs and associated health impacts that will accumulate continually and increase through time. Such an approach fails to fulfill stewardship responsibilities to either current or future generations.

E. DOE's Qualitative (RDS) Evaluation Process

15. The DOE-manager dominance, excessive discretion, absolute control over arbitrary 'weighting factors' and decision criteria, and complete failure to address tribal cultural values and concerns makes DOE's RDS process highly suspect as either a balanced and objective evaluation process. Moreover, the entire RDS process appears to have been invented largely to justify current budget allocations. This is because DOE program managers take the RDS and their ADS, and ask themselves whether 'risks' (or 'compliance') can be used to justify their ADS. Of course, the answer is always 'yes,' except for those compliance activities that DOE managers deem unimportant.

Rather than building a from-the-bottom-up process that starts with tribal and 'stakeholder' values to frame and guide the analyses, DOE-RL's process employs a top-down approach through the Priority Planning Grid. This matrix was developed by senior RL management and included no tribal or 'stakeholder' input and does not address the full scope of 'risks' present at Hanford. Moreover, the basic assumptions that underlie this process (DOE Risk Report, Volume III, Appendix C, p. C-233) fail to account for major tribal concerns—a matter of great concern because these assumptions fail to include such fundamental shared values as "Protect the Columbia River," recognition of the Tri-Party Agreement as the legal framework governing Hanford 'clean-up,' and depend excessively on the notion that "adequate institu-

tional and administrative controls will remain in place" (line 8), without any clear identification of what is 'adequate.' Although 'Global Assumptions' state that "if these controls are presently inadequate, the corrective action would be the subject of a separate RDS" (lines 9-10), CTUIR/SSRP staff are not aware of any efforts to identify and resolve such issues. An example would be the critical need for comprehensive groundwater pump-and-treat programs to reduce long-term, both on- and off-site risks to sensitive populations. Moreover, although the report assumes that the "most reasonable, realistic, and credible scenario" will comprise the basis of the risk evaluation (lines 28-29), key issues outlined in the Scoping Report about critical tribal populations, values, lifestyles, resource use, and disproportionately greater exposure are ignored.

Budgets are not developed for the sole and narrow purpose of addressing 'risk.' Resulting budgets are the products of extensive political compromises between DOE site and headquarters managers and Congress. Furthermore, the definition of 'risk' involves highly subjective evaluations and quantification and often misses critical concerns, problems, or needs of tribal communities. Hence current budgets, which actually were formulated two years ago, do not necessarily or systematically address the full spectrum of 'risks' or other relevant activities present at any DOE site (transportation is omitted, for example) or the interests or concerns of tribal communities (which are often more difficult to 'measure' and are not 'budgeted'). Moreover, the long-term value/benefit of successive or additive short-term actions alone may not appear 'justified' based solely on narrow cost-benefit analyses, which have been completed in either spatial or temporal isolation, in response only to federal budget cycles, and in the absence of simple common sense (groundwater pump-and-treat programs).

16. Although CTUIR/SSRP staff have been unable to review the RDS process (Volume III, Appendix C, 334 pages) in detail, an independent analysis of the RDS approach by Dr. Barbara Harper, Pacific Northwest Laboratories, Richland, Washington, is enclosed as Attachment B. Dr. Harper's incisive and detailed comments should provide DOE with numerous specific examples by which it can measurably improve both its RDS process and DOE's approach to environmental management decisionmaking in general. As it stands, the RDS process appears characterized by so many built-in—and unacknowledged—assumptions, limitations, biases, uncertainties, and values as to be highly limited as an effective evaluation tool without fundamental revisions. Explicit identification and discussion of RDS process limitations should be provided, along with detailed recommendations about how this process can be redesigned to comprehensively evaluate all major risks, without regard to whether or not they are budgeted.

F. Creation of National Sacrifice Zones

17. As discussed in the Scoping Report, some of CTUIR/SSRP staff's—and assuredly other communities'—greatest fears are being realized when DOE's Risk Report proposes the creation of National Sacrifice Zones, where "some sites have been so contaminated that neither the technologies nor the budgets are available for clean-up. Such sites, e.g., ... the Nevada Test Site, could be fenced, maintained, and left in place. Other sites could be restored to the point where they pose no near-term health risks to surrounding communities, but could also be fenced and left in place." (p. 5, emphasis added).

18. DOE's persistent and excessively optimistic dependence on such 'institutional controls' profoundly misrepresents the true long-term health and economic costs of no-action, ignores future, indirect, and cumulative impacts over time, and inherently discounts the value and precludes the options of future generations. Moreover, by permanently denying access to traditional tribal lands, resources, and culturally important sites, 'institutional controls' represent a *de facto* abrogation of tribal treaty-guaranteed rights. DOE's proposed creation of National Sacrifice Zones (p. 5) clearly demonstrates that DOE wants to just walk away from its legal and moral obligations to its own citizens, justified on the basis of selectively evaluations of 'risk.'

G. 'Institutional Controls'

19. DOE's report incorrectly concludes that although Hanford is highly polluted, there are no substantial 'risks' because potential 'exposure' is effectively limited by 'institutional controls,' such as restricted access (fences). What nonsense. This narrow 'perspective' selectively argues that such 'controls' actually reduce 'risks' without the additional hassle and expense of clean-up simply by instituting more 'cost-effective' mitigation measures—a rather contorted 'logical' argument. Instead of including the full duration of impacts—and recognizing that they will change with time, a static snapshot of the present alone is falsely assumed to be 'representative.'

Ultimately, 'institutional controls' are neither cost-effective nor credible, and offer dubious long-term protectiveness.

20. Unfortunately, long-lived, environmentally persistent, and mobile contaminants, which are widespread at Hanford, do not respect such fences or engineering controls and, with time, will inevitably reach human and ecological receptors via groundwater or other pathways. Some now widespread Hanford contaminants are known to bioaccumulate, biogeochemically transform or environmentally recycle and spread, and remain bioavailable and highly dangerous to both humans and ecosystems for thousands of years. DOE's single-minded focus on only the here and now is emphasized not only by its unwavering commitment to 'institutional controls' but also by its refusal to recognize the ever-increasing future threats posed by spreading and commingling groundwater contaminant plumes through time.

By DOE's narrow definition, these threats pose only low 'risk' because current discharges are (mostly) below regulatory limits or because of currently limited exposure pathways for those Hanford contaminant plumes that have yet to reach the Columbia River. Thus the inevitable, increasing future discharges, concomitant environmental and human health impacts, and exponentially increasing future remedial complexity and costs—no matter how large—can be readily dismissed from further consideration.

21. Moreover, other types of 'institutional controls,' such as surface barriers, also represent short-term and short-sighted solutions to long-term problems. CTUIR/SSRP staff have submitted detailed comments outlining tribal concerns about the effectiveness, lifespan, and long-term protectiveness of interim measures such as surface barriers for persistent long-lived contaminants, especially under highly variable Hanford subsurface conditions (CTUIR/SSRP letter to EPA, Comments on 200-BP-1 Remedial Plan, April 10, 1995). In addition, the proposed widespread construction of such barriers would create significant direct, indirect, and cumulative on- and off-site impacts as a result of the mining of vast quantities of basalt (rock) and topsoil to just cover up hundreds of dangerous waste sites in the name of 'remediation' at Hanford.

By their very nature, 'institutional controls' remove no contamination from the environment and may fail to eliminate exposure pathways over the long-term, therefore, they result in no real reduction in the true current and cumulative risk posed by such hazards, either now or in the future. For example, a recently reported (March 1995) off-normal occurrence at Hanford documented the loss of control of radioactive material and spread of radioactive contamination associated with an ant colony in a tank farm in the 200-West Area (241 Vent Station). Although the contaminated area, discovered during routine surveillance activities, was roped off and "cleaned up," such an incontrolled—and uncontrollable conditions—clearly demonstrates the susceptibility of 'institutional control' to fail unpredictably.

H. Risks to Worker Health and Safety

22. An excellent example of DOE's ability—and institutional intent—to manipulate risk assessment and risk-based decisionmaking processes to fit its own predetermined ends in DOE's new-found concern for worker health and safety, but only as it pertains to workers conducting "remediation activities." As noted in the Scoping Report, this issue alone already has led DOE-RL to renege on its formally agreed-upon commitment to remediate uranium-contaminated process trenches in the Hanford 300 Area, only a few hundred yards from the Columbia River. Risks to worker health and safety are important considerations that only lately are beginning to be included in the risk equation, but which cannot selectively emphasize only 'risks' of certain activities while excluding or minimizing others.

23. CERE concludes that remediation 'risks' may pose an even greater threat to workers than to the public or tribal members (p. 50), but fundamentally ignores major issues associated with comprehensive risk evaluation and the inherent assumptions and judgments involved. For example, workers assume risks knowingly and voluntarily in exchange for compensation, whereas tribal members are involuntarily and often unknowingly exposed owing to their traditional lifestyles, dependence upon, and disproportionately greater consumption/use of locally derived natural resources for subsistence, cultural, and ceremonial purposes. Moreover, workers are aware and take advantage of numerous mitigation/protection measures, which commonly are not available or known to tribal members, or which would require blanket abandonment of traditional cultural practices and lifestyles. Both CERE and DOE 'experts' have glossed over such fundamental distinctions.

24. DOE's new-found concern for worker health and safety stands in stark contrast to its historical and even current perspective governing certain other activities. Although 'remediation activities' are highlighted as a major source of concern for excessive worker 'risk,' no similar concern surrounded either historical production op-

erations or even surrounds current waste management activities today. Ongoing surveillance of stored wastes and plutonium routinely exposes hazard- and risk-aware workers and incrementally increases their associated risks simply to maintain the status quo of perpetually 'managing' such materials.

I. Holostic Environmental Management and Values-Based Decisionmaking

25. There is more to good environmental management decisionmaking than just risk. As CTUIR staff observed in the Scoping Report, the fundamental basis of all decisions always returns to values—but whose? The values embedded throughout DOE's Risk Report and evaluation methodologies are strictly those of DOE managers overly concerned with cost, liability, and perpetuating the corporate entity, rather than with the impacts of their actions on local American communities involuntarily located too close to DOE nuclear weapons production facilities and their demonstrated impacts. Although local non-Indian communities benefited from 50 years of steady employment and a huge influx of Federal dollars, tribal members were forced to give up access to ancestral lands, had their heritage lands and resources polluted, and received no compensation. It is deeply disturbingly ironic that, and not to diminish the impacts of dropping two atomic bombs on Japan, many people hurt by past, current, and future DOE activities and their impacts are fellow Americans that such activities were ostensibly intended to protect.

26. The values of affected communities must frame the decisionmaking process from the very beginning and guide its conduct of technical evaluations and selection of remedial action(s). Affected community values are not simply afterthoughts ("factors which must be considered," as DOE contends; p. 20) which can be applied to fine-tune or filter decisions whose outcomes already are predetermined, if only by the narrow limits of the questions asked by risk assessors or decisionmakers. Many such overarching values already have been identified in highly successful DOE-sponsored forums, such as the Hanford Future Site Uses Working Group and the Tank Waste Task Force, and framed recently completed renegotiation of the Tri-Party Agreement under Environmental Restoration Refocusing. But DOE has yet to effectively integrate these values into its planning and decisionmaking processes.

J. DOE Risk Report Conclusions and Proposed Next Steps

27. DOE's Risk Report strongly endorses risk-based decisionmaking for establishing policy on environmental management issues and prioritizing remedial actions. DOE's conclusions about the role and future of risk-based decisionmaking at DOE facilities are disturbingly few and far between, narrowly focused, and indecisive. Major conclusions (p. 57-58) are narrow and largely self-serving, and focus primarily on demonstrating to Congress how effective DOE's budget is at addressing what DOE considers 'significant' risks and compliance agreement requirements. Not surprisingly, DOE concludes that most of its budget largely addresses significant risks (88%), meets compliance agreement requirements (84%), and simultaneously addresses both significant risks and compliance agreement requirements (78%). DOE then complains that compliance agreements have had "uneven results" in how they have addressed risks (threats), without at the same time acknowledging that such agreements were not drafted solely for this narrow purpose. DOE (incorrectly) concludes that 'institutional controls' have been and will continue to be instrumental in limiting (short-term) tribal/public exposure potential and hence 'risk' at DOE sites. No conclusions are provided addressing whether such activities protect the rights, interests, and involvement of communities such as sovereign American Indian tribes, or what such communities think about DOE's imposed standards and values.

28. "Proposed Next Steps" (p. 58) are among the weakest aspect of the entire DOE report. These should provide a strong, clear, comprehensive, and focused series of overall objectives and approaches to systematically identifying and assessing large-scale environmental management goals and available remediation alternatives. As noted throughout these comments and in the Scoping Report, sound environmental management policy requires a much broader perspective than just risk. Although there have been repeated opportunities for 'panels of experts' such as CERE, the RDS process, and now CRESP, to provide lavish taxpayer-funded evaluations of 'risks' posed by DOE sites and activities, each of these processes consistently excludes meaningful involvement of affected communities and forthright recognition and addressing of their legitimate concerns. It is this persistent omission that must now be corrected.

29. Instead of tackling hard questions presented by major technological, institutional, economic, and political challenges to 'clean-up,' DOE's proposed next steps focus largely on further rationalizing the widespread and almost exclusive use or risk-based decisionmaking and cost-benefit analysis throughout the nuclear weapons

complex, regardless of unique local conditions and impacts, community desires and interests, and political considerations. Risk assessment is being promoted as an effective, impersonal decision tool that will interject 'rationality' into DOE decision processes and priority setting. But, in reality, it removes accountability and responsibility from human agency managers, sidesteps agency responsibilities, and places decisions out of reach of non-agency 'experts.' The net result of such numerical orchestration is often used to 'scientifically' demonstrate that "everything's OK" and to justify maximum pollution discharges and minimal pollution clean-up. Such approaches do not protect CTUIR rights, lands, interests, sovereignty, and communities.

K. Refinement of Ecological Risk Evaluation Methods

30. DOE's Risk Report fails to holistically and rigorously evaluate ecological systems. There is an overarching need to expand the current exclusive focus on ecotoxicolity to include such factors as habitat quality and integrity, biodiversity, minimization of habitat alteration/destruction, biological structure and function, historical or baseline habitat conditions, and abiotic media conditions and quality.

III. CONCLUSIONS

CTUIR/SSRP staff hope that the enclosed comments will prompt DOE into developing the holistic environmental management goals and objectives that are so clearly missing from its current EM program and direction. Such comprehensive goals will be essential to defining a credible, technically sound, and politically acceptable decision process for addressing DOE's legacy of half a century of unparalieled pollution—and the impacts it now has and will continue to have on local communities long into the future. Risk-based decisionmaking may have an important, if subservient, role to play in this process—if, and only if, it can be reformed to fully incorporate and rigorously evaluate the full scope of risks presented by DOE sites and activities.

All of our comments return to the central theme of the dire need to conduct comprehensive environmental 'clean-up' in the field at DOE sites across the nation in order to protect the human, ecological, and cultural health of the CTUIR impacted by DOE activities. Moreover, any decision process must first and foremost focus on aggressive actions in the field, not contribute to further delays, divert attention and dollars from actual environmental clean-up, or result in endless discussions of narrow issues or approaches. CTUIR/SSRP staff believe that detailed tribal involvement in environmental management planning and decisionmaking is essential to accomplishing these widely shared goals, and that such involvement has not been as effective as it could be up to this point. Consequently, substantive process actions must match DOE's supportive words in its Risk Report about how essential and important tribal involvement is to credible, comprehensively based, technically sound, and politically acceptable environmental management planning and decisions.

Thus far, DOE's entire process has been a failure of consultation, a failure of the DOE Indian Policy, and a failure in DOE working together with its 'constituents,' despite the self-initiated and time-intensive outreach efforts of CTUIR/SSRP staff. Tribal reservation residents, much more familiar with local conditions and constraints, have much unique and irreplaceable knowledge and experience to offer—if only the so-called 'experts' will take the time to listen and communicate openly and freely. Unfortunately, our comments herein must repeat many ideas already expressed in the Scoping Report, but which apparently had less impact than tribal staff intended on DOE's development of both a credible holistic environmental management decision process and its report to Congress. CTUIR/SSRP staff still hope that DOE—both HQ and RL—will thoughtfully respond to the Scoping Report, and that an open, ongoing, and mutually respectful dialog will be established in order to reform this process to better address tribal rights, interests, and values.

CTUIR/SSRP staff sincerely want to open a dialog—a two-way dialog—with both DOE HQ and RL about how to improve DOE's environmental management decision process. Please work with us and help us to protect our communities, resources, lands, lifestyles, and Tribal culture. If there are further questions, please contact either me or Tom Gilmore, SSRP Hydrogeologist, at 503-276-0105.

Sincerely,

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COMMENTS ON DOE RDS ACTIVITIES BY DR. BARBARA HARPER, PACIFIC NORTHWEST LABORATORIES

EM-6 is to be complimented on incorporating the material from the CTUIR Scoping Report, from Building Consensus, and from its own Risk Principles into the draft June 30 Report. However, there are several areas where the RDS process and methods could be improved to incorporate tribal concerns and to better reflect the cited documents.

The Hanford Site falls entirely within tribal lands ceded to the U.S. Government for limited use by the Treaties of 1855. In addition, the Columbia River also provides off-Site traditional resources and flows through additional ceded areas after leaving Hanford, and thus each potentially affected tribe has distinct historical and cultural interests in Hanford related resources. While there are general similarities among concerns expressed by different tribes, a "generic" approach to incorporating tribal concerns into the RDS activity may not fully satisfy the individual concerns of each tribe. Each tribal government is a separate sovereign entity and should be contacted individually.

A few general comments about the overall concept of trying to justify budgets based on risk reduction are as follows:

- Hanford lacks a vision of how to prioritize individual activities properly because there is no overall Site-wide Integrated Environmental (i.e. eco-cultural) Management Plan. There is no concept of what the Site should look like in 50 or 100 years, only a vague idea that if we busily do things for 30 years and complete our checklist, the "mission" will have been successfully met.
- The entire mental model of prioritizing from the bottom up (start with RDS, then match artificially derived benefits and illogical ADS breakouts) has no bearing on overall Site-wide goals. It further does not consider life cycle costs, the full range of cumulative direct and indirect impacts, and so on.
- The most serious deficiencies in the overall RDS process include the following:

1. The definition of risk needs to be revised to include accidents. Do not try to distinguish between hazards and risk. Risks exist long before exposure becomes excessive. Hazards and exposures are both sources of risk.
2. Tribal concerns and eco-cultural impacts need to be added as parameters.
3. Ecotoxicity, habitat quality and ecorisk need to be better defined and handled.
4. The choice of receptor location (at Hanford) needs to be revised.
5. The process for real government-to-government tribal involvement needs headquarters commitment, with a requirement that individual Sites be held accountable for proper, early and open consultation.
6. A life-cycle approach is preferable to the annual budget approach.
7. Site planning assumptions and risk assumptions need to be better defined.
8. The overall concept of what DOE can claim risk reduction credit for needs discussion. Institutional controls do not count. Waste stabilization and reduction do. Engineering controls and engineered barriers may or may not.
9. The Hanford Priority Planning Grid needs to have RL managers' weights removed, and cultural risks added.

Individual comments are as follows:

1. CTUIR technical staff are interested in collaborating with EM-6; EM-6 should talk directly to CTUIR technical staff, who can guide EM-6 through the proper government-to-government channels. Policy positions are ultimately established by the tribal governing body, but CTUIR technical staff have the expertise and perspective to assist EM-6 in matters relating to the RDS methodology, risk assessment, risk management, risk policy/technical guidance, cost-risk principles, environmental management and, ultimately, land-use planning. Please make a firm commitment

to consulting directly with CTUIR (and other tribes) at the initial steps during the next round of the RDS process.

2. Locally, the communication and consultation process has actually taken a step backwards, with less involvement lately than last year, and the RDS activity and other risk activities are among them. The Hanford Site Nations have had a difficult time getting DOE/RL to provide access to the process. It is understood that this is not the responsibility of EM-6, but EM-6 could help merely by asking that major efforts such as the RDS activity (which admittedly this year was under a severe time constraint) include extending an invitation to participate to each tribe at the beginning of the process. This would ultimately improve cost-effectiveness, both because tribal technical staffs, while they have considerable technical expertise, have limited resources available to spend on providing detailed comments at later stages of projects, and because each missed opportunity to proactively collaborate translates into increased risk of potential conflict. Please make a commitment to require that local Sites henceforth involve the appropriate tribal governments during the entire discussion, revision and implementation process.

3. Cultural Risk needs to be added to the risk assessment framework (the framework needs to cover ESH&C risks, not just ES&H risks), because parameters related to cultural impacts of accidents and contamination is part of the information base required for the risk characterization step. Tribal concerns and "cultural risk" are not just weighting factors based on opinion or preference to be applied to conventional ES&H metrics during the risk management step.

4. Add a section to the Report that recognizes that tribal nations are natural and cultural resource Trustees. Add a similar parameter to the QRM/RDS scoring sheets. This recognition is limited at DOE and is frequently omitted from the risk debate. The acceptance of Trustee responsibilities by DOE is often marginal, and is not generally part of the consciousness of DOE managers; this is reflected by gaps in the RDS information.

5. Add a section to the Report that acknowledges that some DOE Sites are located on ceded lands, and that local tribes have on-Site treaty-reserved rights specified in various treaties. Recognition of this at Hanford is often ignored or actively denied, causing not only tension and mistrust but also lost time and money due to project missteps.

6. Conventional risk assessment is inadequate for evaluation of traditional lifestyles and cultural practices. These activities are at risk from DOE actions, and must be part of Site qualitative parameters that reflect key concerns.

7. Tribal concerns are not just Risk Management considerations. Both CENR[1] and the EM-6 Risk Principles miss the point that it is inadequate to use cultural concerns to "weight" ES&H risks, especially when ES&H risks have not been based on data related to tribal exposure scenarios or risks to cultural activities and values in the first place. This is a perennial problem raised repeatedly by community groups across the nation as well as by tribes—many of the specific tribal issues are very similar to community concerns. Please make a commitment to invite CTUIR and other tribes to provide a briefing to DOE about the risk paradigm and the need for reforming the mental models.

8. An evaluation of risks to tribal "culture" includes factors such as (1) the availability and use of uncontaminated traditional foods, medicines, and cultural materials, (2) extra exposures received during traditional activities, (3) full access to and safe use of specific ceremonial locations, (4) the knowledge of elders in their own tribal community about traditional resources and their seasonality, localized collection places and methods, and proper usage, (5) the continuity of this knowledge between generations, (6) community cohesion centered around key socio-religious resources, and many other things. It is thus apparent that tribal culture itself is at risk due to contamination of eco-cultural and religious resources, physical disturbance of traditional areas, restricted access to on-Site heritage lands, and impaired use of off-Site heritage resources. Building Consensus states that these types of fac-

[1] *See,* for example, the Memorandum for the CENR Subcommittee on Risk Assessment (OSTP, March 7, 1995): "Risk Assessment Research in the Federal Government." While the initial definition of the scope of risk assessment includes "impacts on human health, natural resources and social systems," the rest of the document discusses "social and behavioral elements of risk assessment" that are limited to behavioral responses to real or perceived risks and ways to avoid risk through voluntary behavioral modifications. There is no awareness that cultures (and land-based tribal culture-religions in particular) are harmed if they are forced to significantly alter traditional community practices in order to avoid exposure. Tribal culture-religions are inseparable from the natural environment, and originated as specific socio-religious patterns in specific locations due to unique environmental, ecological, and spiritual conditions. The misconception that all "cultures" can be translocated intact from one place to another without harm is carried through in much of the risk analysis literature and needs to be corrected.

tors can be placed in the quantitative risk assessment framework (p. 16), and that this will improve the risk assessment process (p. 24). Note that Building Consensus refers to general community concerns, and that CTUIR technical staff, in their Scoping Report, support these concepts. Please make a commitment to involve CTUIR in the development of parameters related to this concern.

9. The definition of risk used in the Report (risk = dose × the probability of an adverse effect at the dose) is awkward. The definition of exposure is really the definition for dose (dose = concentration × time). To say that hazards pose a risk only if there is excessive exposure is not standard. Reconsider the definition of risk. Risk is really a series of probabilities: probability of contaminant release, probability of exposure, probability of effects, and so on. If the definition were broadened to include those probabilities, it would seem that EM would be better able to justify dollars spent on future permanent risk reduction.

10. The conclusion of the June 30 Report is that Hanford is polluted and hazardous but not risky because no one is excessively exposed, and, further, that DOE is spending billions of dollars wisely to keep people at low enough exposure levels that there is no "unacceptable" risk. However, in the Report DOE seems to be claiming risk reduction credit for what are really mitigation measures (especially engineering and institutional controls) by "addressing" hazards without necessarily cleaning anything up.

11. Waste management activities (such as waste stabilization and consequent reduction in releasable inventory) technically do not reduce risk because no one is exposed in the first place. Since the probability of contaminant release and the probability of exposure are not part of the Report's risk equation, then Waste Management activities get no credit for reducing those probabilities. The RDS "high risk activities" are really high-hazard activities, not high risk activities, because the public is not actually excessively exposed. The wording in the Report implies that these are high-hazard activities that could also become risky in the event that someone becomes excessively exposed—this logic is very strained. Clearly Site managers (and the public and politicians) generally do not make such a striking distinction between hazard and risk. The most dangerous and unstable source in the world would pose no risk until it explodes—do you really mean that? We recommend that either accidents be considered as a separate source of risk, or that the definition of risk be expanded to include both the probability of accidents and the probability of symptoms from excess exposure.

12. Perhaps it would be useful to provide some examples of exactly how you want to distinguish hazard from risk. For instance, mountain climbing might be high-hazard/high-risk, but mountain climbing with lots of safety equipment might be high-hazard/low-risk. This distinction, however, strays into the area of voluntariness and avoidance behaviors, which are probably not applicable to tribal cultural risk. From an occupational perspective, one can indeed undertake hazardous activities safely, but the public/worker distinction needs to be carefully considered.

13. Since 100% of the budget has been evaluated and is distributed among ES&H risks, it appears that DOE spends nothing to separately address cultural risks or tribal concerns (since ES&H risks do not completely encompass tribal risk concerns). Cultural risk does not seem to be part of compliance activities, and could not be addressed separately out of future budgets because the entire budget is already used to "address" ES&H risks. Please explain how Site-wide environmental management goals (including both the natural and cultural landscapes) will be used to formulate specific mission objectives relating to cleanup, worker protection, natural resource protection and the restoration of access for pursuit of cultural/traditional activities, all within the existing budget.

14. Genuinely include eco-cultural risk. DOE is to be complimented on recognizing that the Priority Planning Grid needed to have RL managers' weighting factors removed. However, the selection of items to include in the RDS is also a value judgment that generally overlooks eco-cultural factors that are also at risk and in fact drive many of the decisions on Site. The Qualitative Risk Matrix needs to be refined and reorganized to include eco-cultural risk, which at present is omitted altogether. Table C3 has several socio-cultural factors (and each activity receives a numerical score), but they are not carried through in the QRM or the RDS scoring sheets. Existing cultural risk also needs a Before/After score on the summary sheets. Since all ecological resources are cultural resources to the affected tribes, the section on environmental effects needs to be strengthened as well. Relevant metrics can only be developed with the aid of tribal staffs (a relatively informal process); please make a commitment to do so.

15. Include a section in the Report that recognizes that tribal members are at disproportionately high risk for a number of reasons. Even a screening-level activity needs to consider this. The Environmental Justice Executive Order clearly calls for

such an evaluation for large-scale federal actions, which would include allocation of cleanup resources.

16. Revise the choice of receptor location, especially at Hanford. For the general public, it may be appropriate to assume an off-Site location (at the Site boundary). Tribal members, however, have treaty-reserved rights to follow traditional practices on-Site (and do currently exercise those rights in a limited fashion), both along the on-Site sections of the Columbia River, and also in tribal exclusive-use fishing zones immediately downriver from Hanford. At Hanford, traditional activities originally (and within living memory of tribal elders) occurred at all these locations—the right to continue traditional practices is still exercised, and the goal is to restore full access and safe usage wherever possible. The choice of the most appropriate receptor location is therefore scenario-, and contaminant- and pathway-specific, with on-Site locations being most relevant for some conditions and contaminants, water/fish pathways for others, and airborne pathways with human receptors along the shoreline or on the River for still others.

17. Ecological receptors were not adequately dealt with in the June 30 Report (and the entire concept of how to define hazard, dose and exposure in the ecological sense is fuzzy). Habitat quality is as important as ecological toxicity, and the integrity of the entire eco-cultural landscape needs consideration in a single added parameter.

18. The potential for cumulative intergenerational impacts needs to be addressed by adding a question about total duration of the impact (past and future) and its reversibility.

19. Refine the concepts of "current" risks. The problem with future impacts due to present conditions (or future exposures from current "hazards") has been largely sidestepped due to the definitions used in the Report. This is melded with the concepts of short-term and long-term releases and acute and chronic exposures/effects that all need to be sorted out, even for a screening-level activity.

20. While it is appropriate to prioritize remedial actions on the basis of urgency, the designation of known future massive exposures as "low risk" needs discussion, especially since it implicitly "discounts" the worth of future generations. This attribute could be called low urgency, with urgency = magnitude × imminence.

21. Although accidents are not part of the RDS risk picture (according to the risk = existing exposure" definition) the fact remains that there is a current risk of accidents under existing conditions that needs to be considered.

22. Revisit the "global" assumptions about present land uses and institutional controls. Two major assumptions used in the Hanford section of the report are that (1) residential (and traditional/subsistence) uses do not presently occur on Site (including the River, the river corridor and downriver from Hanford), which has already been shown not to be strictly true, and (2) that the continued imposition of institutional controls will prevent such use indefinitely or for as long as "unsafe" levels of contamination persist, which in some cases is for tens of thousands of years. These assumptions are uniformly objectionable to the tribes, since they *in absentia* determine that sovereignty, treaty rights, and cultural practices are not at risk and that harm (especially cultural harm due to discontinuity in access to on-Site heritage lands and impaired use of off-Site heritage resources) does not accumulate. The assumption that an institutional control measure that imposes continual cultural harm is a low-cost way to prevent exposures is an issue that is becoming increasingly contentious.

23. A better temporal description of these types of impacts needs to be reflected in RDS wording. However, even the "risk = exposure" definition shows that there is a current "risk" to on-Site and off-Site cultural resources and traditional practices due to existing contamination of eco-cultural resources. This could easily be parameterized and evaluated.

24. Next Steps: first bullet ("improve stakeholder involvement"). This step does not appear to recognize that Sovereign Nations require a level of involvement that is separate from, earlier than, and more intense than ordinary "stakeholder involvement." It is not clear that DOE/HQ practices this or that DOE/RL accepts it. For instance, the summaries for Hanford and INEL do not appear to recognize that sovereign nations are present, that they have not endorsed the planning or RDS assumptions, and that they have not been allowed to participate in the development of Site-specific assumptions and planning documents, even though they have produced numerous reports and comment-response documents and clearly have the technical expertise and long-term perspective that DOE and Sites need to draw on to make technically defensible and acceptable decisions. A separate bullet for tribal involvement needs to be added.

25. Guidance Documents and Statements of Principle that have received at least unofficial approval by tribal technical staff:

Building Consensus—active stakeholder participation required from scoping through implementation; full range of risks includes health, environmental, social, religious and cultural risks.

Environmental Justice Executive Order—Requires analysis of environmental, human, economic and social effects of federal actions, and specifically includes subsistence consumption patterns.

DOE Tribal Policy—mandates involving tribes in the process of developing actions, policies and programs that significantly impact them (§7.e3); sets policy to "...encourage early communication and cooperation..."

EM-6 Risk Principles—recognizes social, cultural and economic factors, but fails to include them in the risk assessment framework, and relegates them to "considerations" rather than systematically evaluating them.

DOE Environmental Management Order (not released yet?)—Whether or not a Hanford Land Use Management Act ever passes CENR and Congress, each major Site still needs to develop a single comprehensive Site-Wide Environmental (= Eco-Cultural) Management Plan. This plan would not be composed simply of a cultural management plan and a biological resources management plan, but would have a higher set of integrated principles providing a much clearer picture of the real Site mission than currently exists. Local tribes are beginning to work on such plans.

EPA Comparative Risk Guidance Manual—EPA has a 10 year history of evaluating "quality of life" in addition to ES&H risks, with full community participation—the process works and the results are accepted by participants.

26. Hanford Planning documents that have not received inter-governmental endorsement, which are actively opposed by tribes and/or stakeholders, or which tribes and/or stakeholders have not had the opportunity to participate in or review.

"Hanford Mission Plan" (opposition to planning assumptions; lacks recognition of required information base and tribal standing; no participation). "Hanford Strategic Plan:" same.

"Priority Planning Grid" (no participation; limited review, pre-weighted with managers' preferences).

"Risk-Based Approach to Hanford Site Cleanup" (no participation or review; assumptions, methods and conclusions unknown).

*Information Sources Relating to DOE Environmental Management Activities**

- Report Legend
  CTUIR: Confederated Tribes of the Umatilla Indian Reservation
  CERE: Consortium for Environmental Risk Evaluation
  WMPEIS: Waste Management Programmatic Environmental Impact Statement

Figure 2

ATTACHMENT A-2
CTUIR VERSION

*Information Sources Relating to DOE Environmental Management Activities**

* Report Legend
CTUIR: Confederated Tribes of the Umatilla Indian Reservation
CERE: Consortium for Environmental Risk Evaluation
WMPEIS: Waste Management Programmatic Environmental Impact Statement

Figure 2

Ms. FURSE. Thank you, Mr. Chairman.

Mr. Chairman, everyone agrees that Superfund needs some strong medicine, but we must make sure that the cure doesn't kill the patient. Unfortunately, I believe that much of H.R. 2500 will do just that.

Thank you.

Mr. OXLEY. I thank the gentlelady. The Chair would state for the record that the gentleman from Oregon who was invited to testify was invited a week ago. There was never any uncertainty about the date of this hearing. He apparently chose not to attend and we regret that particular part of it.

The gentleman from Iowa, Mr. Ganske.

Mr. GANSKE. Thank you, Mr. Chairman. I will keep my remarks brief.

Let me just say that I am disappointed. I am disappointed with industry and insurance critics who demand changes to fit their needs. I am disappointed with an administration that seems unwilling to go beyond a few basic reforms agreed upon last year. This is a big problem; it's one that we need to move on. I think your bill is a step in the right direction, and I look forward to the testimony today.

Mr. OXLEY. I thank the gentleman.

The gentleman from Massachusetts.

Mr. MARKEY. Thank you, Mr. Chairman.

Throughout the 1980's the Republican administrations waged a deregulatory war against many independent agencies, including the EPA. The Reagan and Bush administrations fought this war primarily with three weapons. First, by having the fox guard the henhouse. Second, by putting the agencies on a starvation diet. And third, by sending in the grim reaper of so-called regulatory relief.

In her autobiography, Ann Gorsuch Burford, former head of the EPA during the Reagan administration, described the litmus test used in choosing the EPA administrator back in 1981. According to Burford, when Dr. John Hernandez, her top competitor for the job, was being considered for that position he was interviewed by Reagan administration officials about his views about the EPA. Hernandez reported to Burford that: "I went into that interview very cautiously because I knew that these people wanted to make major cuts at EPA, so I was quite reluctant to say anything I didn't believe in the way of philosophy or approach. I was absolutely terrified of becoming the head of the EPA and all that mess it was in, so it was in the forefront of my mind during all that meeting that anything I said to those guys I would have to live with when I became the administrator, and finally at one point Fred Khedouri leaned over in his chair and quietlike but dead serious asked, would you be willing to bring the EPA to its knees?" I was so startled that I kind of just laughed as if I couldn't believe he had said that. But he had said that and I just demurred. And when Ann Burford was selected as head of the EPA instead of me, I was very much relieved.

Well, because of the negligence and the mismanagement and the malfeasance of Ms. Burford, her assistant Rita Lavelle, and their successors, Congress undertook a series of investigations and in-

quiries into the program led by this committee, which ultimately resulted in passage of legislation to amend the Superfund law in 1986 to correct the mess that had been created over a 6-year period by those who had been given the responsibility during the Reagan administration to run it.

But problems with implementation of this program continued throughout the remainder of the Reagan and Bush administrations. Now, in 1995, the Superfund program is working better than it ever did during the first 12 years of the Reagan and Bush administrations. We no longer have a fox in charge of the henhouse. Instead of industry lapdogs, we have a vigilant watchdog on guard, and under her supervision more sites have been cleaned up and delisted during the last 2 years than during the entire first 12 years of the program.

Despite the recent successes, however, in the administration's program, we now hear the same old song that was responsible for crippling the program's initial implementation, and now they claim they are going to "fix" Superfund. Unfortunately, their fix once again starts with a starvation diet for the EPA. The congressional Republicans have already slashed the Agency's budget, appropriating 30 percent less than the administration's request. And now, here comes the Grim Reaper of regulatory relief: ROSA.

There are a number of provisions in ROSA which will wreak havoc with the EPA's ability to administer an effective Superfund program. Let me share with you a few of my favorites.

First, there is the Ed McMahon Polluter's Clearinghouse Sweepstakes. ROSA tells polluters, "Congratulations, you may have already won millions of dollars in fabulous cash rebates. All you have to do is wait for Congress to pass this bill. Soon our prize van will be on its way to your corporate headquarters with a rebate check to pay you for cleaning up sites that you polluted."

Then there is the Evian Solution, which doesn't require polluters to clean up contaminated groundwater as long as another source of drinking water can be provided, such as bottled water. In other words, don't worry about polluted groundwater, have another bottle of Evian.

Then there is the Super Fence Fiction, which does not require polluters to actually clean up a contaminated site but only requires that exposure to toxins be reduced using the lowest cost mechanism. In other words, a fence. As everyone here knows, the typical condition of a fenced Superfund site is the fence is down and kids are riding go carts and ATV's up and down the toxic mounds.

Finally, there is the Bleak House litigation provision. You all remember Charles Dickens' classic novel in which a family is torn asunder by an interminable lawsuit which doesn't end until the lawyers have extracted all the money in legal fees. This bill allows previously decided remedy solutions to be reexamined in court, thereby guaranteeing additional delays and countless billable hours for Superfund attorneys.

We need to maintain polluter pays. We need to maintain the current pace of cleanups. We have to ensure that we don't turn existing sites into national industrial production sacrifice zones with fences around them. We must have standards that will be on the

books that the public can be sure will guarantee that these sites will be cleaned up.

I wish, Mr. Chairman, that this hearing was not held on the same day as reconciliation so that more of our members throughout this afternoon could hear the testimony rather than being out on the floor of those that disagree with the approach which is being taken. I understand that all points of view will be heard. I'm just afraid that our panel will not be able to hear it.

I yield back the balance of my time.

Mr. OXLEY. The gentleman's time has expired.

All the opening statements will be made a part of the record under unanimous consent.

The gentleman from Georgia, Dr. Norwood.

Mr. NORWOOD. Thank you, Mr. Chairman. I hope you will join with me in pulling for the Cleveland Indians tonight so that we can end this series Saturday in Atlanta.

Mr. OXLEY. The gentleman's time has expired.

Mr. NORWOOD. Thank you very much, Mr. Chairman, and I'll yield back.

We appreciate this hearing. I am especially pleased to see Ms. Browner of the EPA will be testifying in the second panel today. I am very interested in hearing her comments on our comprehensive reform bill ROSA.

From what I understand, the administration may have some problems with the liability reforms in ROSA. I, on the other hand, do not believe that Superfund can truly be reformed unless we address all aspects of the plan, especially liability.

I read about a case just the other day. Under our current system someone can be held liable without showing any negligence or any fault. This flies in the face of common sense and common law. Right now any owner, past owner, generator or transporter associated with a Superfund site can be held liable.

Because of this strict liability, the State of New Jersey is now suing the Catholic Archdiocese of Newark because the archdiocese purchased land across the street from its Holy Name Cemetery that has been associated with the PJP landfill. The archdiocese did nothing wrong other than being in the wrong place at the wrong time and having deep pockets.

Strict liability has gotten out of control so much that at some sites the companies that were brought in to clean up the sites are now being sued to help fund the cleanup. This system is clearly out of hand.

In looking at the retroactive liability, we see a system equally bizarre. Of course Administrator Browner as recently as June 27 of this year has been quoted as saying it is not unfair. Because of the retroactive liability, companies that have been acting in an environmentally responsible manner are being sued.

A particular example of this involves the Swope Oil and Chemical Company in New Jersey. The site on which Swope is a PRP is where Swope sent their waste chemicals to be recycled. Here is an example of a company doing the right thing and then having the government come back and bite them.

Mr. Chairman, having this knowledge, it is obvious that you are taking the proper steps in bringing forward ROSA this year. Any-

one that stands in the way of this necessary reform is obviously not living in the same world that we are.

I thank you very much for the time. Mr. Markey, I certainly appreciate your comments. It helps me clearly understand that we are headed in the right direction. Thank you very much.

Mr. OXLEY. I thank the gentleman from Georgia.

The gentleman from New York.

Mr. MANTON. Mr. Chairman, thank you for scheduling today's hearing on legislation you have introduced to reform the Superfund program. I appreciate your hard work in developing comprehensive legislation that seeks to address many of Superfund's problems.

While we may disagree on the specifics, I believe we can all agree that we must work toward a solution that strengthens our ability to clean up hazardous waste sites in a more efficient and fair manner.

I know we have many witnesses today and I am eager to hear from them, so I will keep my remarks brief.

I am especially pleased that Administrator Browner is here to testify as well as representatives from other Federal and State agencies that have a significant stake in this program. It is important that we truly understand their views and concerns along with those from other constituent groups that we have heard from throughout this process.

Since it is my understanding that this subcommittee will be moving quickly on H.R. 2500, I want to continue my review of this bill in a more informed manner.

Clearly a great deal of work has gone into reforming Superfund this year and the country would greatly benefit from any improvement in the program. But we need to be certain that this reform effort actually results in a superior program that truly addresses Superfund's current problems.

I still have some reservations about H.R. 2500 in regard to remedy selection and liability. I hope the information we gather today will help us address these and some of the other concerns that have been raised regarding this legislation.

I yield back the balance of my time.

Mr. OXLEY. The gentleman yields back.

The gentleman from Louisiana, Mr. Tauzin.

Mr. TAUZIN. Mr. Chairman, I will be brief. I wanted to again congratulate you for the awfully difficult and excellent work you have performed already to bring us to this point.

Not too long ago I would have been your ranking minority member working on this. We had been in that position, Mr. Wyden working with Mike, trying to see if we could in fact build a bipartisan effort here, because if there is ever a need for one, it's in this area. If there are concerns about the bill, I hope we can resolve them not only through this hearing process but through the efforts we always make at bipartisanship on this committee.

The reason it's so important for us to reach a bipartisan solution, of course, is that the program by all accounts has proven not only that it can work, that it should work, but that in so many cases it isn't working.

When the President himself in his first State of the Union address called upon Congress to do something about this bill he high-

lighted it, if you recall, and said that it was time we stopped spending so much money in the courtrooms and spend a little more money cleaning up America's waste.

The dollars we have available to us, both Federal dollars and the precious dollars we collect from the private sector, are extremely limited here, and yet the job seems to be almost unlimited. The number of sites that we keep evaluating and keep turning up seem to grow every day.

We cannot have a system that simply spends too much money on one site arguing about who is liable, too much money at one site trying to gold plate it to conditions that don't make practical sense, and then never getting around to cleaning up the other sites where communities are desperately waiting for some relief and where the migration of hazardous chemicals continues to occur even as we sit here talking about it.

So the effort you make in this bill and the effort I hope we make in a bipartisan fashion to deal with this will get beyond some of the political rhetoric that sometimes divides us and get beyond some of the rhetoric that sometimes makes it difficult for us to move because outside interest groups seem to have more fun trying to pin everybody against the wall instead of trying to come to terms with a cooperative effort to resolve our differences, and get beyond the fact that we are obviously in very contentious times on the floor in the middle of very difficult budget constraints.

So I hope that this effort really does become a truly bipartisan one that builds a better program, that utilizes the limited funds that we have in a more constructive way to deal with the great universe of problems we have in this area, and that ends up being one where not only will the government officials who run the program but the folks who are putting up the dollars will come to us in years ahead and say thanks, we appreciate the fact you fixed it in a way that now it's working; we are getting a dollar value for a dollar spent, and we are actually cleaning up more sites in America.

I, like many members, would love to see a total repeal of the retroactivity provisions. I know your dollar constraints. I frankly admire the fact that you have taken the position you have. We are going to go as far as we can with the dollars we have without making changes we cannot afford nor pay for, and until and unless we can demonstrate that we can pay for them, we are going to make only the changes that we practically can. I think that is the only approach to take in this very important area, and I support you in that effort. I wish that others who support these reforms would join with us in encouraging you to continue in that effort and hopefully one day to find those resources.

Finally, Mr. Chairman, I want to point out that there will be a lot of criticisms leveled at your effort. I hope th in the course of criticizing this effort it is constructive criticism, that someone not only characterizes this work in terms of a political critique, but also constructively offers different solutions, a different way of handling it. If someone doesn't like the remedy selection provision, suggest a change, suggest a difference that might work and where we can agree.

I happen to think your remedy selection makes a lot of sense, id I am ready to defend it with you, but if somebody has a prob-

lem with it, I am very open, as you should be, as we all should be, in hearing a constructive suggestion for change. If we approach it in that manner, not trying to characterize each other's intent or motives or work product, but rather trying to make sure that we collectively in a bipartisan manner fix those problems, this process can not only go a lot smoother but we can get a bill passed a lot faster and we can end some of this awful debate and instead begin some real and substantial cleanup of America's hazardous waste sites.

Thank you very much, Mr. Chairman.

Mr. OXLEY. The gentleman's time has expired.

The gentleman from the upper peninsula of Michigan.

Mr. STUPAK. Thank you, Mr. Chairman. Mr. Chairman, I appreciate you having these hearings, but unfortunately it's a bad day as we have got reconciliation on the floor and I'm going to have to be in and out, but I do appreciate at least an opportunity to have a hearing on this bill, and I look forward to the testimony we will be receiving today.

Being a new member of this committee, I looked to see what happened last year. Whether you were a blue dog, an old dog, a mad dog, or a former dog, or like Billy, a stray dog, everyone on the committee supported last year's bill.

It went through this committee 44 to nothing. So I'm a little perplexed as to why we have a whole major rewrite. I know there was an election, but when members voted for it last year I hope they believed in what they voted for, and to come back now 10 months later and have a whole new rewrite doesn't make a lot of sense to me.

So I urge the new members of this committee to take a look at last year's bill which went through here 44 to nothing. That was a bipartisan bill. Unfortunately, I'm afraid the one we have before us may not be. As we go through this hearing, take a look at last year's bill, keep those main themes in mind, and make comparisons like I have and hopefully we can bring bipartisanship back to this committee and maybe we can get a bill out of here 44 to nothing.

With that I yield back the balance of my time.

Mr. OXLEY. The gentleman's time has expired.

The gentleman from Ohio, Mr. Gillmor.

Mr. GILLMOR. I will submit a statement for the record.

[The prepared statement of Hon. Paul Gillmor follows:]

PREPARED STATEMENT OF HON. PAUL E. GILLMOR, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

Mr. Chairman, there is an old saying that goes "don't ask for the things you don't want, you might just get them." I believe this is a more than apt title for our hearing today.

At one point or another, many of the groups here to testify today expressed a strong desire for the need to reform Superfund. Just about everyone, businesses, environmental groups, state governments, agreed that Superfund reform was overdue. In fact, some of the groups working on this issue were formed with the defined purpose of reforming Superfund. Unfortunately, as we gather together, these same groups that argued very passionately to reduce transaction costs, speed cleanups, and make remediation standards more manageable, now are complaining that this bill is insufficient.

Like many, I support the repeal of retroactive liability. Unlikely some, I have publicly advocated this position for a long time. However, I have come to believe that our federal budget deficit will not allow us to reach this goal the way things now

stand. The budget is not an esoteric issue, it needs to be dealt with and it is one of the reasons that I am in the majority. If we, somehow, find the money at a later time to get to a full repeal, I, for one, would not hesitate to implement it. But, I resist efforts to paint this bill as disingenuous when it comes to honestly approaching liability, free lunches are offered at soup kitchens, not this committee.

I am an original cosponsor of this bill, not because of what is not in it, but because of what it is. I believe we must begin to see the forest through the trees. Our hearing is a first step toward making meaningful reform of Superfund. It is essential that in stating what we don't want, we keep in mind that this bill gives States added roles at NPL sites, brings practicality to cleanup standards, and more efficiently uses and saves taxpayer money.

I look forward to listening to our witnesses, both those here to extol and condemn this legislative offering. I believe that there are good suggestions to be made and needed questions to be asked. This process should help us get to the point of knowing whether the public good is truly being served and if the complaints levied against this bill are valid. In the end, I hope we all get what we asked for, a solid piece of legislation establishing good public policy.

Mr. OXLEY. The gentleman from California.

Mr. BILBRAY. Thank you, Mr. Chairman. I appreciate your holding this hearing today and moving this legislation along. Let me just say for my colleague who just spoke, the difference this year is there are some of us that sit on this committee now who have over a decade of experience trying to administer this program first hand, and I think there is a little bit of a reality check that is being included in this year's legislation that wasn't possible because of the lack of practical background that existed on this committee last year. So enough of the cheap shots to the senior members of this committee from a freshman, and we'll move on to the fact that the chairman and his staff has taken great strides to pass——

Mr. STUPAK. Will the gentleman yield?

Mr. BILBRAY. Yes, I yield.

Mr. STUPAK. My intent was not any kind of cheap shot.

Mr. BILBRAY. Excuse me. I said that my intent was a cheap shot.

Mr. STUPAK. Okay. I hope you looked at last year's bill.

Mr. BILBRAY. Thank you.

The fact is, Mr. Chairman, that your staff has tried to work with real world solutions here. I guess the proof is in the pudding. When the two extremes of this issue oppose your bill, I think that it probably speaks for itself that maybe you are on the right track. Some interested parties may not like this proposal, but I think that there is overall a good document.

There are some concerns that I have with specific provisions of the existing text. Mr. Chairman, I remain confident that we can resolve these problems through appropriate dialogue. I will be brief because I am eager to get to Ms. Browner and our other witnesses. I want to touch on certain areas.

The sanctions which pertain to State liability on site and the delegation of the authority to States to implement cleanup programs are of great interest to me. The State government, unlike the Federal Government, has not generally been operating polluting facilities. However, they have in some situations become liable for their actions simply by going onto the site to address the cleanup problem. Riverside County had a situation in an area called Stringfellow.

I would like to see ROSA clarify that States and local governments are not defined under the law as owners or operators simply because they exercise their regulatory power. If a government

agency were to actually contribute to the cause and release, they should certainly be held liable, but liability should not be passed on to the State for trying to do their job and clean up the site. We don't hold the Federal EPA responsible by this standard, Mr. Chairman, and I don't think that it's fair that States ought to be held to it.

Authorization of State programs; as it now stands, Superfund is the only major environmental statute which is not implemented by the States. States generally have been more productive than the Federal Government in cleaning up Superfund sites. But these successes are not reflected in how we implement CERCLA up to this point.

I would like to see us move to a point where a choice of either authorization or delegation would be available to the States, depending on the specific needs and abilities to implement a cleanup. In this scenario U.S. EPA would conduct periodic audits of States carrying out such a program. If shortcomings were found, EPA and the State would then outline a workable plan and time table for addressing them. In a State which did not want delegation or authorization or was not able to implement its own program, EPA would continue to run the program.

While I recognize that the current language in ROSA does provide limited delegation of programs to States, I am interested in providing ample incentives for capable States to assume control of the program and move away from maintaining a heavy EPA role in the proceedings.

I would like to see ROSA further distance herself from the traditional circle of dependency of the States on the Federal Government under Superfund.

Most importantly, I want to assure that we are not inadvertently requiring States to undertake costly and complex administrative systems that end up creating two separate, possibly redundant programs, State and Federal.

Mr. Chairman, I have here a recent study from the Reason Foundation entitled "Cleaning Up Superfund: the Case for State Environmental Leadership." This report provides an interesting perspective and review of the Federal Superfund program along with key State cleanup activities. The executive summary contains the following statement: "Unlike most Federal environmental programs, an alternative approach to Superfund is already in place and appears to be doing a much better job. This approach involves the 40-plus State Superfund type programs. Briefly, many of the State programs are cleaning up sites at a fraction of the time and cost of the Federal Superfund. For example, the States are spending about $700 million annually working on their 11,000 sites while the EPA spends approximately $1 billion annually dealing with 1,000 sites."

[The report referred to is retained in the committee files.]

Mr. BILBRAY. Mr. Chairman, I think that these statistics speak for themselves. But let me just close with this one statement.

In the early 1980's when I was supervising an environmental health department, those of us in State and local government were scrambling to try to get recognition and involvement in the Superfund programs. Now, in the early 1990's, we are scrambling

to make sure that we are not included in the Superfund program. I think the proof is in the pudding, in the fact that those who know firsthand the problems in the community are terrified every time the Federal Government walks in with the Superfund program, because they see it as a barrier to taking care of the problem rather than a vehicle.

This legislation, I hope, is modified to the point to where we then can provide the opportunities that local government and the communities thought Superfund was going to provide in the early 1980's rather than the nightmare that we see in the 1990's.

Thank you, Mr. Chairman.

Mr. OXLEY. The gentleman's time has expired.

The ranking member of the full committee, the gentleman from Michigan, Mr. Dingell.

Mr. DINGELL. Thank you. I appreciate the courtesy. Mr. Chairman, I commend you for having this hearing today. I hope as the hearing goes on we will appreciate the virtues of speedy consideration of legislation and not learn the misfortunes and vices of excessive haste.

For 2½ years we have debated the reform of the Superfund program. A number of hearings have been held before this committee, including a number investigating performance of EPA contractors and EPA itself.

Superfund desperately needs reform, but it needs responsible reform and careful consideration. We cannot lose sight of the central purposes of Superfund: to clean up hazardous waste sites expeditiously; to remove the health and environmental threats posed by the sites; and to return the sites to the communities for productive use.

Towards these ends, I introduced a comprehensive Superfund reform bill on the first day of this Congress, 10 months ago. More recently I joined our friend and colleague Mr. Sherrod Brown and a number of other colleagues in introducing legislation to spur the redevelopment of what are called brownfields in our urban cities. I am concerned that your bill departs dramatically from the purposes of the Superfund program, Mr. Chairman.

Although we have heard frequently that EPA has accomplished little, all cleanup decisions have been finalized at more than 700 sites. This is approximately two-thirds of all the private sites on the National Priorities List. This bill will require EPA to reopen all of these cleanup decisions and then allow these decisions and any new cleanup decisions to be challenged in court. If you want to watch the business of lawyering and litigation slow the Superfund process, this is a fine opportunity to do so.

Why are we now creating new and better opportunities for delay and litigation when we have agonized for almost 3 years about cleanups being too slow? How can we now explain to the communities that have been waiting for cleanup that they must wait more years for the resolution of endless court battles which will be triggered by this legislation? How can we justify these delays and at the same time defend costly special relief provisions to those who are responsible for creating the pollution?

Let me discuss that. It is most curious that under this bill the government is going to write rebate checks to people who have al-

ready disposed of toxic waste after Superfund and other environmental laws were enacted and to write checks to the owners and operators of toxic waste sites. The government may well spend more time and money writing rebate checks to polluters than in cleaning up toxic waste sites.

I have a number of other concerns, Mr. Chairman, about this proposal. During our hearing last week we heard opposition from State program managers to terminating the National Priorities List and dumping contaminated sites on States with sparsely funded programs. We heard opposition to preemption of State cleanup standards. We heard opposition to the bill's failure to adequately protect uncontaminated groundwater.

We are also aware that the bill contains a number of special relief provisions, including some for EPA contractors, a good number of whom were investigated by this committee. Those are the contractors who fleeced taxpayers by charging government for all manner of curious events, including liquor, entertainment, tickets to rock concerts, reindeer suits for parties, Santa Claus suits, tickets to sporting events, and other extravagances which were not permitted under Federal law. Why?

Last year responsible reform was unanimously agreed to in this committee. It was a vote of 44 to nothing. All parties, environmentalists, government, Federal, State, and industry agreed that this was a good bill. H.R. 2500 departs dramatically from the consensus reached last year despite the broad support that we had received from all affected parties.

While the legislation before us moves in the opposite direction, it is my hope that we can reach intelligent and sensible consensus on this matter.

Thank you, Mr. Chairman.

Mr. OXLEY. The gentleman's time has expired.

The other gentleman from Michigan.

Mr. UPTON. From the "LP".

Mr. OXLEY. That's right.

Mr. UPTON. Thank you, Mr. Chairman. I have a statement for the record. I would just like to say a few things, one of which is despite this committee passing Superfund reform last year on a 43 to nothing vote, it was almost the single largest thing that broke my heart last year that we never got to the House floor and the other committees passed this bill out by unanimous consent without objection on a voice vote.

I appreciate your leadership on this issue. I am delighted we have had a series of hearings and I look forward to getting this bill to the floor yet this year. I yield back the balance of my time.

Mr. OXLEY. The gentleman's time has expired.

[The prepared statement of Hon. Fred Upton follows:]

PREPARED STATEMENT OF HON. FRED UPTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. Chairman, thanks to your good efforts, today's hearing could be our final hearing on Superfund. As one who sat through all of the hearings in the last Congress and most of the hearings in this Congress, I thought I'd never see this day.

We heard from numerous experts as the hearings opened, people who had written studies and books, people with charts and graphs, experts on liability and cleanup technologies. In their dispassionate way, they analyzed the Superfund program and told us of its many failings.

But as interest in the program began to heighten, we began hearing from some of the everyday folks caught up in Superfund. We heard from small business people, shopowners, drycleaners, service station owners, scrap metal recyclers and owners of small commercial properties in districts like mine in Southwest Michigan, Mr. Chairman, and in those like yours in Ohio.

We heard about "potentially responsible parties" and "contribution suits." It was then that the full horror of Superfund began to unfold. We heard from senior citizens who had seen their life savings disappear in Superfund's tidal wave of litigation. We heard from local officials. We heard from people who had purchased properties contaminated years before their ownership who had been found liable for cleanup costs as "current owners." We heard from small banks caught up in "lender liability" and from estate executors with trusts entangled in contribution suits. We heard from Main Street in towns like St. Joseph and Findley and Sturgis and what we heard was not pleasant.

If ever there was an example of the "Law of Unintended Effects" that haunts all policymakers, this is it. The program that was to free America of toxic waste problems has itself become a problem. It has entangled thousands of individuals and small businesses and hundreds of local governments in a web of discord, recrimination and litigation. It has turned neighbor against neighbor, business against business and government against the people it ostensibly serves. It has divided whole communities and made them poorer.

I cannot believe this is what Congress or the President intended when Superfund first became law. I cannot believe that any sitting Member of Congress wants the program to go on this way, either. And, I cannot believe that people of good will cannot get together in the weeks ahead and fix a program that is torturing this country.

Superfund has become a super headache. It's time to give America some relief.

Mr. OXLEY. The gentleman from Ohio.

Mr. BROWN. Thank you, Mr. Chairman. We've heard during the Republican revolution of the last 8 months over and over several principles, 3 of which I think are good to keep in mind today.

One is that we've talked particularly about welfare people and personal responsibility and how important personal responsibility is.

We've also heard a good deal of talk about and some legislative action to cut litigation and reduce the role lawyers play in the society.

The third thing we have heard much about is returning or devolving power to the States.

I hope that those 3 principles, responsibility, personal responsibility, corporate responsibility, cutting litigation and returning power to the States, that we will think about those 3 principles as we deliberate on ROSA in the days ahead.

Thank you, Mr. Chairman.

Mr. OXLEY. I thank the gentleman for his statement. I know he has a heavy heart this morning. At least you weren't here for Mr. Norwood's cheap shots.

Representing a former playoff team, the gentleman from Washington State.

Mr. WHITE. I had a feeling that was coming my way, Mr. Chairman. I appreciate it very much. All I can say is we are looking forward to next year very much.

Mr. Chairman, I graduated from law school in 1980, the same year that the Superfund law was passed. I guess I really should be grateful to this law, because in the law firms that I practiced in for the 15 years since that time they reaped quite a windfall from this bill, and I suppose indirectly I got some benefits out of that myself.

But the fact is any of us who have been in the private sector or who have been out in the real world during the time that this bill has been in effect have seen the problems that this bill has. It doesn't work as well as it should work. I think that is what we are trying to address here in this hearing.

There are those who will tell us, and frankly we've heard some of them tell us today, that any change to the status quo means that we are backing away from environmental protection. I think the Superfund law that we have in place now is a perfect example of the contrary. The fact is this bill tries to do some things that need to be done, but it doesn't do them well. What we are here to try to do today is to reform this law so that it does a better job of cleaning up the environment. That's really the fundamental principle that the bill before us is based on.

This is a significant piece of legislation for my district. We have a very environmentally conscious district, a number of Superfund sites in my district and in my region. For that reason, on September 11 of this year I held a forum in my district, Mr. Chairman—I think I've mentioned it to you—where we had a number of experts from the Pacific Northwest come in and tell us what the heck they thought about this law. We had about 60 of the foremost people in our area come in and talk to us about it, a number of community leaders; we had environmental activists, and just across the spectrum on this issue.

If I could sum up in one statement the message that I got from that hearing, it would be a statement that was made by Norm Wynn, a well recognized member of the environmental community, a hiker at the Mountaineers in Seattle. His comment was the following: "One can be an environmentalist, as I am, and agree that a system which encourages litigation, delays cleanup and imposes enormous costs on companies for activities which were legal 20 years ago has room for improvement."

I have to say that I agree with Mr. Wynn. I think your bill is designed to address that. I congratulate you for it, and I look forward to hearing the testimony of the witnesses on this bill and their suggestions for improvement.

I think the bill as you have submitted it makes a good start. I just hope it goes far enough. That will be one of the issues I would like to explore with some of the witnesses who will be coming before us today.

Thanks, Mr. Chairman, and I yield back the balance of my time.

Mr. OXLEY. I thank the gentleman. The time for opening statements has expired. We will call our second panel, Panel II, Administrator of the U.S. Environmental Protection Agency Carol Browner. I will allow you to introduce your distinguished colleague.

STATEMENT OF HON. CAROL M. BROWNER, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ACCOMPANIED BY ELLIOTT LAWS, ASSISTANT ADMINISTRATOR, OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE

Ms. BROWNER. Thank you, Mr. Chairman. It is indeed a pleasure. Joining me is Elliott Laws, the Assistant Administrator for the Office of Solid Waste and Emergency Response. OSWER is the part

of the Agency that has the day-to-day responsibility for the Superfund program.

The good news, Mr. Chairman, is we agree with much of what we've heard today. We have heard criticisms of the program that we share. We believe that we have a good story to tell and would like to take a moment to tell that story.

For those of you who don't know me, I ran one of the largest State environmental agencies before coming to this job. We came to our positions believing that Superfund was broken, that Superfund needed desperately to be fixed, that we had to reform Superfund to make it work faster, fairer, more efficiently to clean up the toxic waste sites across this country and return the land to productive use.

I want to thank you, Mr. Chairman, for your hard work in introducing the legislation now before the subcommittee, and we look forward to a bipartisan process that will result in a reauthorized program this year and complete the work on a responsible reform bill.

We have no disagreement with those who criticize the early years of this program. This was a program launched by top level political appointees, Ann Gorsuch and Rita Lavelle, who cared more about lunch with the polluters than they did about creating an important, successful toxic waste cleanup program for the people of this country.

Over the last 2½ years this administration has worked hard to fundamentally change the Superfund program. In addition to working in a bipartisan manner in the last Congress to craft legislation, we have undertaken a series of administrative changes within the existing law. As a result of these changes the program today is fundamentally different than it was several years ago.

We have succeeded in removing 10,000 small parties from the liability net. We have removed more than 24,000 sites from the master list CERCUS, clearing the way for economic redevelopment in communities across the country.

We have accelerated the pace of cleanups. In 1994 and again in 1995 we completed nearly as many Superfund cleanups in the course of 12 months as were completed in the first decade of the program.

Let me be very precise. Under this administration we have cleaned up 196 sites in 2½ years. That is more than in the first 12 years of the program. We are averaging more than one cleanup per week completed.

Three weeks ago we announced our third series of reforms, which will result in even more small parties being taken out of the Superfund liability net, further reduce cleanup costs and litigation, speed cleanups, and promote greater State and community participation in the program.

Mr. Chairman, we believe these are the last reforms that we can make under the existing law. We have gone as far as we can in pushing the envelope of the existing law. To finish the job of reform we need Congress to pass a new Superfund law that will protect public health and our environment, speed cleanups, and direct more money to cleanups and less to lawyers.

I want to be clear about the Clinton administration's position. We firmly believe that the new law must embody the principles that human health and the environment shall be protected and those responsible for the worst pollution must pay to clean up that pollution. These principles are embodied in H.R. 228, the Consensus Superfund Reform Act of 1995 introduced by Congressman Dingell. The Clinton administration supports this bill.

Everyone worked together in crafting that proposal; industry, environmentalists, State, local governments, and citizens. It was a difficult process, but it was an honest effort to reform the system to make it work better.

While we agree that H.R. 2500 does provide some important provisions embodied in H.R. 228, including protections for the lenders, prospective purchasers, municipalities, small parties, we do not believe that on balance the bill will solve the problems of the Superfund program.

First, H.R. 2500 as introduced does not adequately protect public health and the environment. It mandates that cost must be the most important factor in deciding how a Superfund site will be cleaned up. This could well lead again and again to the selection of quick fix solutions: a fence around a contaminated site instead of cleanup. This might be cheaper in the short run but dangerous and costly in the long run.

H.R. 2500 also eliminates the current statutory preference that most toxic contaminants found at Superfund sites actually be cleaned up. This administration maintains that public health and environmental protection must continue to be the paramount concern in selecting the remedies at sites.

Perhaps most troubling, H.R. 2500 would roll back the current statutory goal of cleaning up contaminated groundwater. Fifty percent of the American public depends on groundwater for the water they drink. The provisions in H.R. 2500 would replace the requirement that we actually restore our children's drinking water supplies with exposure control provisions and in far too many instances simply require the delivery of bottled water.

Perhaps the most perplexing provision in H.R. 2500 is the almost total disregard of States' rights. Many States have taken the time to adopt cleanup standards, in some instances more stringent than Federal standards. They believe that is what is necessary to protect their resources. The result of this bill is that in most instances States could no longer apply cleanup standards that offer an extra measure of protection for sensitive populations or valuable water resources.

It is the firm belief of this administration that the purpose of the Superfund program is to protect public health and our environment and that a program that does anything less represents a breach of trust with the American people, with the American children.

H.R. 2500 also rolls back current measures to restore damaged natural resources such as economically important fisheries. There are members from the Clinton administration here who act as trustees for natural resources, and they will speak more specifically to this part of the bill.

There is one provision, however, that I would like to speak to. As we understand the bill, Mr. Chairman, if the Exxon Valdez had

been carrying hazardous waste, the responsibility to clean up the damage done by the spill would be capped at $50 million. We don't think that's fair to the American people.

Fencing off contaminated land, issuing deed restrictions, providing truckloads of bottled water to exposed communities, these kind of solutions do not provide the long-term protection for the 1 in 4 Americans who still live near a toxic waste site or for future generations. We cannot pass on a toxic legacy of abandoned sites to our children and our children's children.

Remedies that fail to adequately clean up toxic waste sites not only pose a threat to public health and the environment but also severely limit opportunities for economic redevelopment at many sites. H.R. 2500 mandates that any remedy greater than the lowest cost option may be chosen only if it is justified by a measurable risk reduction benefit. This requirement precludes common sense consideration of economic redevelopment goals of the community in selecting a cleanup.

We also believe that H.R. 2500 would roll back the progress we have made in speeding the pace of cleanups. Under our administrative reforms we have been able to reduce the pace of cleanups from 12 to 8 years.

We believe that H.R. 2500 would cause delays in cleanups of more than 700 Superfund sites across the county by allowing for the reopening of virtually every decision that has heretofore been made. Cleanups would be slowed or halted and local communities held hostage as lawyers argue endlessly over risk assumptions and cleanup levels.

This bill invites countless rounds of judicial second-guessing during the cleanup process. This is a lawyer's relief act. There is more opportunity for litigation in this bill than in the existing program. Mr. Chairman, we all agree that more litigation and delay is the last thing that we need in the program.

As I said previously with respect to the liability provisions, we believe that the largest polluters should be responsible for cleaning up the problems they caused. While H.R. 2500 does not totally repeal liability, it does unfairly shift much of the cost of cleanup from the polluters to the treasury by creating a special liability discount or rebate program. Taken together, the liability discounts and exemptions in H.R. 2500 would literally bust the budget.

We are completing an analysis of the cost of H.R. 2500. What we have already been able to understand is that several of the provisions alone, the exemption, the rebate provisions, would exceed $1 billion annually. We are analyzing the cost of the other requirements and will provide them to the committee as soon as we are completed.

It is important, Mr. Chairman, to understand that under the budget for EPA put forward by the House leadership we only have $1 billion in Superfund. You all are proposing to cut the Superfund budget. Yet we have a bill with $1 billion new dollars in costs. Obviously we can't afford this. We don't have the dollars. Dozens of Superfund sites are waiting for construction funding to complete cleanups. Now is not the time to force the government to pay polluters.

Mr. OXLEY. Administrator Browner, I'm sorry to interrupt. We have a vote on the floor.

Ms. BROWNER. I have one more sentence.

Mr. OXLEY. That will be fine. We will take a break and then come back for questions.

Ms. BROWNER. We appreciate that. Thank you, Mr. Chairman.

In closing, Mr. Chairman, 1 in 4 Americans still live within 4 miles of a Superfund site. We believe we have made dramatic changes in the program. We look forward to completing the changes in the law necessary to clean up the sites in a faster, fairer, more efficient manner.

Thank you.

[The prepared statement of Hon. Carol M. Browner follows:]

PREPARED STATEMENT OF CAROL M. BROWNER, ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY

INTRODUCTION

Good morning, Mr. Chairman, and Members of the Committee. I am pleased to have this opportunity to appear before you to continue our discussions on responsible and effective reforms for the Superfund program. Accompanying me this morning is Elliott Laws, Assistant Administrator for the Office of Solid Waste and Emergency Response.

My primary purpose today is to provide comments on H.R. 2500, the Reform of Superfund Act of 1995. Last year I testified several times on other legislative proposals for comprehensive reform of the Superfund program, including H.R. 4916, the Superfund Reform Act that was supported by the Administration and a coalition of industry, small business, environmental, environmental justice, public interest and citizen's groups, state and local governments, and the insurance industry. H.R. 4916 was reintroduced this year as H.R. 228.

Based on experience with last year's reform efforts and my involvement with Superfund as the Administrator of EPA, I believe that any comprehensive reform package must be evaluated with respect to the five primary areas where new legislation is needed to improve the Superfund program. Reform legislation must be evaluated in terms of how well it delivers with respect to:

- Protecting public health and the environment
- Completing cleanups faster at lower cost
- Reforming the liability scheme
- Reducing transaction costs and litigation
- Involving the community in decisionmaking

Your bill, Mr. Chairman, does not deliver in these areas. Indeed, as I will explain, your bill will make things worse in every one of these areas.

I will also contrast your bill with H.R. 228, which was introduced on January 4, 1995, of this year. H.R. 228 is strongly supported by this Administration. It is comprehensive, responsible reform that dramatically improves the Superfund statute in all five of the areas requiring new legislation.

It should be noted that the Superfund program has achieved notable successes despite the problems that legislation is needed to address. The emergency response program has protected public health and the environment from the consequences of thousands of spills and releases. Consistent with the bedrock principle that polluters should pay for cleanup, responsible parties are undertaking three of every four long-term cleanups. Settlements with responsible parties are valued at well over $10 billion. With the significant involvement of these responsible parties, construction is complete or underway at nearly 800 National Priority List (NPL) sites, well over half the sites on the NPL. Of these, 346 are construction completes (sites where remedial action has been taken and only long-term monitoring, e.g., ground-water monitoring or pumping and treating, remains). The rate of construction completes has increased significantly in the last two to three years.

These accomplishments demonstrate that responsible parties play a vital, and in our view, irreplaceable role in cleaning up the nation's Superfund sites. Efforts that undermine the principle that the polluter pays will seriously undermine the ability of EPA to continue to address the worst hazardous waste sites in the country.

EPA has also shown recent success in "getting the little guys out" from under Superfund liability. EPA has settled with more than 10,000 de minimis parties. These settlements reflect a significant effort and commitment of resources, and demonstrate a real commitment to fairness in the program.

The Superfund liability scheme provides powerful incentives for proper waste management practices. Today, people who generate, transport, or dispose of hazardous substances are extremely careful about selecting facilities for disposal. Today's responsible conduct is a good example of just how far Superfund has moved this nation forward in its waste management practices.

Superfund liability has also encouraged better environmental assessments of property. Environmental assessments have resulted in literally thousands of voluntary cleanups, and full disclosure during property transactions. As a result of CERCLA, or similar State law, 23 States have adopted property transfer laws, and an additional 18 States maintain databases to assist purchasers and other parties to perform environmental assessments of property.

Revisions to the liability scheme, remedy selection process, and other important elements of the Superfund program, must be carefully considered and evaluated based on their impact on the goal of protecting public health and the environment from the threats posed by uncontrolled releases of toxic waste.

COMMENTS ON H.R. 2500

Protecting Public Health and the Environment

Any Superfund reform bill must be evaluated on how well it protects human health and the environment. H.R. 2500 provides inadequate protection. The bill changes the remedy selection process in a manner that will diminish the current emphasis—and the emphasis in H.R. 228—on reliable, long-term protection at reasonable cost.

1. *Exposure Control Instead Of Active Cleanup.* The general standard for remedy selection under H.R. 2500 is that remedies shall protect human health and the environment from realistic and significant risks through cost-effective and cost-reasonable means and establishes a preference for the most cost-effective remedy. Further, H.R. 2500 specifically states that no specific method of remediation is preferred, i.e., treatment or capping is not preferred over institutional controls or natural attenuation. Under this process, the remedies that are likely to be selected are low-cost, exposure control remedies instead of active cleanup measures.

One reason for this result is that H.R. 2500 eliminates several important requirements in current law that emphasize the importance of active cleanup measures. For example, the requirement to select permanent solutions to the maximum extent practicable, the preference for treatment as a principal element, and the requirement to attain Federal and State applicable or relevant and appropriate requirements (ARARs) are not included in the H.R. 2500 (except that discharges into navigable waters must comply with State law).

Further, although H.R. 2500 generally retains the 10-4 to 10-6 risk range from the current National Contingency Plan, the absence of the permanence requirement, preference for treatment, and ARARs together with the omission of the risk range point of departure at 10-6, could mean that most remedies will be selected at the high end of the risk range (10-4).

In addition, cost-reasonable is defined to mean that the incremental cost of the chosen alternative (apparently as compared to other alternatives) is justified and reasonably related to the incremental risk reduction benefits of the remedy. To the extent feasible, costs and benefits should be determined on a net present value basis.

"Risk reduction benefits" are not defined. Presumably such benefits include cancer cases avoided because the bill establishes protective levels for carcinogens. But the bill does not establish a protective threshold for noncarcinogens. It is not clear that reducing threats posed by noncarcinogens (e.g., kidney disease or nerve damage) would also be considered a risk reduction benefit. Moreover, if risk reduction benefits are narrowly defined when considering cost, then the importance of other benefits such as community acceptance or economic redevelopment potential may be under estimated when selecting remedies.

Also not specified as a risk reduction benefit is long-term effectiveness and reliability. It appears that so long as risk is reduced, even if only by preventing exposure to contamination by erecting a fence around the site, the remedy will be cost-rea ble. Also by quantifying benefits on a net present value basis, the long- term (30 y plus) risk reduction benefits may not be fully valued.

E ng a fence to prevent human exposure provides comparable risk reduction
1 e in the short-term as achieved by treating, removing or reliably managing

hazardous waste, even though the latter solutions are more effective at eliminating exposure to hazardous waste over the long-term. Because the cost of the fence is much less, however, than treatment, removal or reliable management, the latter alternatives are not likely to be considered cost-reasonable under the terms of the bill and are unlikely to be selected. This methodology is a short-sighted approach to remedy selection, particularly because it appears that the requirement to conduct five-year reviews has been deleted and because PRPs may not be required to return to the site if these short-term remedies fail.

Current law provides that a review will be conducted not less than every five years if hazardous waste is left on-site. The purpose of this requirement is to periodically evaluate the continued protectiveness of the remedy. H.R. 2500 does not include this requirement. It is not apparent how it will be determined that minimal exposure control remedies continue to be protective of human health and the environ ment.

Under H.R. 2500, a responsible party may receive a final covenant not to sue with respect to future liability if several conditions are met, including payment of a premium to compensate for the risks of remedy failure. But the premium to cover the failure of a fence may be limited to only enough to build a new fence and not enough to ever build a reliable remedy.

The remedy selection procedure in H.R. 2500 will drive remedies to the lower end of the protectiveness goals and emphasize exposure control (e.g., fences) rather than long-term solutions.

2. *Inhibiting Economic Redevelopment.* The emphasis on minimal, low-cost remedies will inhibit economic redevelopment of these sites. If hazardous waste is allowed to remain at these sites, institutional controls will be required to be in place and redevelopment may be prohibited.

3. *H.R. 228.* In contrast, H.R. 228 includes a process to select remedies that are protective of human health and the environment and provides long-term reliability at reasonable cost. Treatment is the preferred alternative for "hot spots," the most highly toxic or highly mobile waste. Reasonableness of costs is one of the remedy selection criteria, not an overarching mandate. Under H.R. 228, remedies would be selected that balance costs, long-term protection and other important criteria so that human health and the environment are protected and, where feasible, sites become available for economic reuse. H.R. 228 is a hazardous waste cleanup bill not an exposure control bill that passes on the legacy of these hazardous waste sites to our children and grandchildren.

4. *Ground Water.* The provisions regarding ground water in H.R. 2500 are also highly problematic. The bill requires that remedies prevent or eliminate any actual human ingestion of drinking water containing hazardous substances above maximum contaminant levels. Elsewhere the bill states that no method of remediation is preferred and that institutional controls, alternate water supplies, and point-of-use treatment are acceptable remediation methods. Using the bill's remedy selection process, the most cost-effective and cost-reasonable method to prevent or eliminate ingestion is to provide bottled water or to treat contaminated ground water at its point of use and to use institutional controls to prevent people from drinking contaminated ground water. Restoration of contaminated ground water to beneficial uses, or even stopping contaminated ground water from spreading, is not likely to be selected under the bill because the incremental cost may not be reasonably related to the incremental risk reduction benefits.

The bill's movement away from restoring ground water is a mistake given the importance of clean ground water. In the United States, drinking water for 95 percent of rural and 35 percent of urban households is supplied by ground water.

Statistics specifically with respect to ground water at Superfund NPL sites are also compelling. At 82 percent of Superfund NPL sites, ground water within 3 miles of the site is used for drinking water. At 348 NPL sites, drinking water wells have already been abandoned or shut down because of contaminated ground water; 521 NPL sites have drinking water wells that are threatened by ground-water contamination, some of which are at the same sites where wells have already been shut down. To ignore this problem, as this bill does by emphasizing prevention of ingestion rather than restoration of contaminated ground water, will preclude groundwater being used as a future source of drinking water and other beneficial uses.

5. *H.R. 228.* H.R. 228 requires restoration of ground water unless it is unsuitable for drinking water or restoration would be technically impracticable or, for low level contamination, unreasonably costly. H.R. 228 allows for restoration of ground water over the long-term considering the need and urgency to use the ground water, i.e., active treatment is not always required and can be combined with natural attenuation to ensure clean drinking water will be available when needed at a reasonable cost.

6. *Preemption of Federal And State Laws*

H.R. 2500 preempts most Federal and State applicable cleanup requirements. The preemption applies at private NPL sites and EPA understands that the preemption applies at Federal Facility NPL sites. For example, Federal or State promulgated requirements under RCRA or the Clean Air Act would not be enforceable at Superfund sites. It will be cumbersome, contentious and time-consuming to develop site-specific standards in their place. Moreover, many States have enacted cleanup requirements, oftentimes more stringent than Federal standards that they believe are necessary to protect their own citizens and environment. Those cleanup requirements that are imposed consistently at non-NPL hazardous waste sites in their State should also be complied with at NPL sites.

7. *H.R. 228.* The Administration supports the elimination of relevant and appropriate requirements because they have proven to be a source of delay and unnecessary expense in selecting remedies. But the Administration supports the retention of Federal and State applicable requirements. Applicable requirements are levels, requirements or standards promulgated under the authority of other environmental statutes; the measures of protection they embody should be used when activities that they regulate occur at Superfund sites. The elimination of Federal and State applicable requirements will not speed up decisions on cleanups and may not provide adequate protection of human health and the environment.

COMPLETING CLEANUPS FASTER AT LOWER COST

The heart of Superfund reform has to be speeding the pace of cleanup and reducing the cost of cleanup. Whether one talks to responsible parties, community groups, environmentalists, or other interested parties, all agree that the process for studying sites and evaluating, selecting and implementing remedies simply takes too long and costs too much.

H.R. 2500 will increase the time required for cleanup decisions dramatically. Transaction costs will also increase commensurate with delays.

1. *The Allocation Process.* Many provisions in H.R. 2500 will result in delays to cleanup. One of the most notable is what happens, or more accurately what does not happen, during the allocation process. H.R. 2500 prohibits EPA from ordering parties at any site that is the subject of an allocation to perform any action until 90 days after the allocator's report is issued. The lone exception is for removal actions that are necessary to address an emergency situation.

The allocation process is started when a request is submitted for an allocation. The request can be made, for example, as soon as the site is listed on the National Priorities List (NPL). Accordingly, EPA would have no authority to order parties to start the sampling, investigation or analysis until after the allocation process is complete, which could easily be a year or more after the process starts. Moreover, EPA would have no authority to order parties to conduct interim actions (e.g., stopping the migration of a ground-water plume) that make sense and will save money if done now rather than later. Unless EPA decided to use its limited resources in the Fund to conduct these activities, no work would be done. All cleanup work at the site would cease during the allocation process. This provision does not make sense and it is not necessary. If parties are ordered to perform work and incur costs in excess of what later is determined to be their fair share, they should be reimbursed for the excess.

Even when the allocation is complete, the bill significantly limits EPA's ability to get cleanup work performed. EPA may issue orders requiring work to be performed only to parties whose aggregate share of the allocated percentage shares of responsibility exceed 50 percent. Because of the expanded scope of the Fund Reimbursable Share, at many sites the aggregate of all parties allocated shares will not exceed 50 percent. EPA will be prohibited from ordering any party to perform cleanup work.

In addition, the bill appears to give allocation parties the option to cash-out and settle their liability rather than perform work pursuant to an order. Providing this choice to PRPs will further inhibit the ability of EPA to get cleanup work performed.

Under the current program, over three-quarters of cleanup work is being performed by PRPs. Under this bill's provision, this percentage will drop substantially. Cleanups will be late in getting started if they get started at all.

2. *Judicial Review Of RODs.* Under H.R. 2500, a Record of Decision (ROD) may be challenged by any person when the ROD is issued. Under current law, remedies can be challenged only when an enforcement or cost recovery action is initiated. This protection is in place to allow cleanups to be implemented right away. By removing this bar on pre- enforcement challenges, H.R. 2500 provides companies the incentive to seek judicial review in order to delay cleanup indefinitely. After years

of investigation, analysis, and decisionmaking, more years will be lost at a site as the challenge to the ROD is litigated. It is a new opportunity to expend transaction costs. It will also hinder both expeditious settlements with PRPs that are willing to perform cleanups and EPA's use of the Fund to take actions to address major threats to public health and the environment.

3. *ROD "Reopener" Provisions.* Another opportunity for delays and increased transaction costs is the provision for ROD "reopeners." Under the bill, at any site where a ROD has been issued but construction or operation and maintenance (O&M) is ongoing, any person (i.e., not necessarily a PRP) may petition for review of the remedy. At hundreds of sites, O&M is ongoing in the form of operation of leachate collection or treatment systems. EPA must select an alternative remedy if it will result in a total life cycle cost savings of at least $1 million and would protect human health and the environment from realistic and significant risks. EPA's decisions on these petitions—both rejections and approvals—are subject to judicial review.

This provision will be incredibly disruptive to the program. It potentially affects nearly 1200 RODs at over 700 sites. Delays and disruptions will occur at sites where cleanups have been accepted by the community and PRPs and are well underway. Not only will RODs have to be amended, but consent decrees and interagency agreements that incorporate these RODs would have to be modified as well. This provision will increase not reduce transaction costs.

4. *Preemption Of Federal And State Laws.* The elimination of most Federal and State applicable standards will also likely result in delays and higher transaction and other costs. Applicable standards are requirements under other environmental statutes that are used as cleanup requirements at Superfund sites. EPA or the PRPs will have to "reinvent the wheel" at every site in order to replace promulgated requirements with ad hoc site-specific requirements.

The development of site-specific standards will be subject to lengthy arguments about whether they will achieve the protectiveness goals in the bill. Even when a ROD is signed, the site-specific cleanup requirements will most likely become one of the primary subjects of judicial review.

5. *Protection Of The Environment.* Adding new terms to important provisions but leaving them undefined will result in delays as petitioners request that the courts determine what the new terms mean. A prime example is the new terms added to "protection of the environment." Under the bill, a remedial action is protective of the environment if it will protect against "realistic and significant risks to ecological resources that are necessary to the sustainability of a significant ecosystem and will not interfere with a sustainable functional ecosystem." "Realistic and significant risks," "sustainability of a significant ecosystem," and "sustainable functional ecosystem": what do these terms mean? Uncertainty as to the meaning and intent of these terms could take the courts years to resolve.

6. *H.R. 228.* The Administration supports several changes to speed up the remedy selection process set forth in H.R. 228. One example is promulgating, through negotiated rulemaking, national goals to promote consistent and equivalent protection across the country. National goals would be used to set site-specific protective concentration levels using standardized formulae from the national risk protocol.

Also developed through negotiated rulemaking, the national risk protocol would establish a standardized process for evaluating risks at Superfund sites, including how risk assessments would be conducted to estimate baseline risks (i.e., whether cleanup was necessary). To the extent appropriate and practicable, the risk protocol would establish standardized exposure scenarios based on different land uses and standardized formulae or methodologies for evaluating exposure pathways. Where standardized tools did not work well at a site, site-specific information would be collected. Some of the key objectives of the risk protocol are to promote consistency in risk assessments and in setting cleanup levels and to promote the use of realistic estimates that neither minimize nor exaggerate the risks posed by a Superfund site. The overall objective is to strike a balance between using standardized information in order to speed up the assessment process and using site-specific information, where necessary, to reach objective determinations regarding the site.

REFORMING THE LIABILITY SCHEME

The principles of retroactive, strict, joint and several liability have enabled the program to achieve the successes I described in my introduction. The liability scheme, however, has often been criticized because it involves significant transaction costs and creates uncertainties by encouraging contribution actions against other responsible parties and claims against insurers.

1. *Retroactive Liability Discount.* H.R. 2500 addresses this problem in a manner that is inexplicable and unaffordable. The cornerstone of your liability reform is a windfall for polluters, reimbursing 50 percent of future cleanup costs incurred by responsible parties with pre-1987 liability (the "retroactive liability discount"). A constant criticism of the current liability scheme is that it penalizes companies for waste activities that took place before Superfund was enacted in 1980. But your proposal will require the Government to in effect write rebate checks to polluters for activities that occurred up to 1987, seven years after every company and individual was on clear notice that they would be held responsible for improper disposal of waste.

There is no defensible public policy for using public funds in such a manner. At a time when Congress is struggling to reduce overall Federal spending, why should the United States give large corporations that were aware of their liability yet pursued sometimes irresponsible waste disposal practices a 50 percent rebate on cleanup costs? It does not make good public policy sense.

2. *De Minimis And Co-Disposal Landfill Exemptions.* Other features of your liability reform include liability exemptions for all de minimis parties (parties that contributed less than 1 percent of the total volume of waste at a site) for pre-1987 activities. At many large Superfund sites, a de minimis contribution may be a very high volume of waste. For example, at the Liquid Disposal site in Michigan, as much as 200,000 gallons of liquid waste would be considered a de minimis contribution. The exemption in H.R. 2500 would simply let those companies walk away from their responsibility to contribute to the cleanup. And when they are allowed to walk away, the public must pay their share of cleanup costs.

Another exemption is provided to all parties at co-disposal facilities (i.e., facilities where household and industrial waste were disposed) that were listed on the National Priorities List as of June 15, 1995, and that were authorized by a State or local government to receive household waste. It should be noted that private PRPs that have contributed significant amounts of industrial waste to many of these co-disposal sites will be exempt from liability under this provision. In addition, nearly 100 of the NPLs co-disposal sites have always been privately owned. These private owners will also be exempt under H.R. 2500. For example, at Lakeland Disposal site in Indiana, Lakeland Disposal service operated a 29-acre sanitary landfillI, which was licensed by the state to accept municipal and certain industrial wastes from specific facilities. Beginning in June, 1974, hazardous materials including cyanide and sludges containing paint, hydroxides of aluminum, and heavy metals were disposed of at the site. In 1978, a court ordered the landfill closed due to improper operations. The same year, mobile home owner began buying portions of the landfill. In the early 1980s, the state detected high concentrations of methane gas near the homes, and requested the residents to move. Although no one lives on the landfill today, a ditch running through the site feeds into Palestine Lake, which is used for recreational activities; more than 1000 residents within 2 miles of the site have private drinking wells; and municipal wells are only 3 miles from the site. The private owner and contributors of industrial waste at this site would not have to pay cleanup costs under H.R. 2500 because the site was authorized to accept municipal waste.

3. *Estimated Costs of H.R. 2500.* The Administration is analyzing the costs of H.R. 2500. Although we have not completed our analysis, EPA has looked at the cost of the exemptions and reimbursement provisions. The costs to EPA of these few provisions alone would exceed $1 billion annually. This estimate does not include the costs of administering a reimbursement program, the cost of reviewing, and possibly litigating as many as 1200 Records of Decision, the cost of reimbursing PRPs for on-going work, the cost of reviewing state superfund programs, or the costs of issuing regulations and guidelines for the many other requirements of H.R. 2500. We are analyzing the costs associated with the other requirements of H.R. 2500 and will complete that analysis of H.R. 2500 in the near future.

EPA's entire Superfund budget for FY 1995 was $1.3 billion. Obviously, we cannot afford over $1 billion to reimburse and exempt polluters. Dozens of Superfund sites are waiting for construction funding to complete cleanup. Now is not the time to force the government to pay polluters.

4. *H.R. 228.* The Administration recognizes that many of these de minimis contributors are small companies and individuals that may be unfairly entangled in the liability scheme. As set forth in H.R. 228, the Administration supports exempting from liability the truly tiny contributors (de micromis). In addition, de minimis contributors of waste, and parties unable to pay their full responsibility for Superfund cleanups, are provided an early opportunity to settle their liability with a full release from the government and protection against suits by third parties. Further, contributors of municipal solid waste are given the opportunity to settle with the

government before the allocation process begins. Under H.R. 228, the liability of these parties is capped at 10 percent of costs at the site. Owners and operators of municipal solid waste landfills are able to settle early as well based on an ability to pay analysis crafted specifically for municipal governments.

The Administration strongly endorses these proposals for exemptions and expedited settlements because they are fair to the smaller contributors at Superfund sites, because they are consistent with the polluter pays principle, and because they are affordable. H.R. 2500 overreaches, extending well beyond these reasonable proposals, by benefitting even the very largest, most culpable companies at the expense of the Fund, resulting in no money for cleanups.

REDUCING TRANSACTION COSTS AND LITIGATION

Another primary goal of the Administration is to reduce the transaction costs of private parties at Superfund sites. H.R. 2500 gives relief from transaction costs with one hand and takes away with the other. It will significantly increase transaction costs at many steps in the process. Superfund attorneys in the private sector are, I suspect, greatly relieved by your bill because it will provide them all sorts of new opportunities for involvement. That is not what the Administration has in mind for Superfund reform.

1. *Liability Allocation Process.* H.R. 2500 includes an allocation process that differs significantly in procedures and outcome from H.R. 228. The allocation process in H.R. 2500 is unworkable and will not achieve the same results in terms of fairness and reduction of transaction costs as H.R. 228.

The so-called Fund Reimbursable Share has been greatly expanded in scope compared to the orphan share in H.R. 228. It encompasses the de minimis contributor exemption, the retroactive liability discount, and any other exemptions or limitations on liability. This means that the Fund will be used to pay a larger share of cleanup costs and is in direct conflict with the principle that polluters must pay the cost of responding to public health and environmental problems caused by their waste.

Even though a large amount of Federal money is at stake, you have in effect excluded the Federal government from the allocation process. Under H.R. 2500, EPA does not have a vote in naming the allocator. EPA is allowed only two opportunities to reject a recommended allocator, even if the nominee is obviously unqualified. No provision allows EPA or the Department of Justice (DOJ) to participate in the allocation process as a representative of the Fund from which the Fund Reimbursable Share will be paid.

The interest of the parties participating in the allocation is obviously to maximize the amount of the Fund Reimbursable Share and minimize their own allocated shares. By not including language specifying that EPA and DOJ have an active role in the allocation process, the parties' interest may be achieved. Although EPA and DOJ may reject the allocator's report if no reasonable interpretation of the facts would form a reasonable basis for the allocated shares or if the process was directly and substantially affected by bias, procedural error, fraud, or unlawful conduct, if EPA and DOJ have not participated in the process, they may have no knowledge whether the Fund Reimbursable Share has been manipulated so that it is much greater than it should be. Or, if they do have knowledge, and twice reject the allocator's report, the second rejection is subject to judicial review. Transaction costs will continue to mount if the allocation process cannot be implemented smoothly and if everyone's interests, including the Government's, are not well protected.

In addition, the bill does not provide that the United States can pursue non- settlors based on joint and several liability. This will work as a disincentive to parties to participate in the allocation process, i.e., they may not necessarily get a worse deal if they refuse to participate in the allocation.

The bill's allocation process is obviously flawed. It does not protect Federal funds and it may not result in as many settlements as anticipated. Transaction costs will continue to remain high as litigation—including contribution actions—remains the most common approach to settle liability.

2. *H.R. 228.* In contrast, H.R. 228 sets forth a liability allocation process that meets the objectives of protecting the Fund and reducing transaction costs. Each responsible party is allocated its fair share contribution of cleanup costs. Parties have the opportunity to pay a premium and receive a settlement from the United States absolving them of future liability. To facilitate settlements, Superfund money is used to cover shares allocated to clearly liable parties that were identified but were no longer in business or able to pay their share (the "orphan share"). The Administration is committed to paying a large portion of the orphan share in order to reduce

litigation and increase the fairness of the program by not requiring solvent parties to cover the costs of the identified insolvent parties.

When the allocation is complete, the United States will pursue non-settlors using the principle of joint and several liability. The retention of joint and several liability for non-settlors is a powerful incentive for responsible parties to settle their liability through the allocation and settlement process rather than through litigation. Also, the commitment of the United States to pursue non-settlors allows settling parties to resolve their liability based on their fair share. Under H.R. 228, settling parties do not have to initiate contribution actions to recover amounts they paid in excess of their fair share and they are protected from contribution actions from others.

3. *Other Examples Of Increased Transaction Costs.* I would like to point out several other examples where transaction costs will increase under this year's bill. The following items are by no means an exhaustive list.

Some of the problems described above that will result in delays will also result in increased transaction costs—judicial review when RODs are issued, ROD "reopeners," developing site-specific cleanup requirements, etc. New opportunities for attorneys in the process are new opportunities for increased transaction costs.

In addition, using 1987 as an arbitrary cutoff date for the de minimis exemption and the retroactive liability discount will result in litigation to determine whether a particular company's activities actually occurred before or after that date. The exemption and the discount are worth enough money that many companies will be compelled to seek judicial rulings on the issue.

INVOLVING THE COMMUNITY IN DECISIONMAKING

The Administration supports the principle that communities must be involved in the cleanup process from the time a site is discovered to the time it is finally cleaned up. Superfund, after all, is first and foremost a local program.

1. *Community Advisory Groups.* While your bill adds many provisions regarding enhanced community involvement, there are significant weaknesses. One weakness is the groups represented on the Community Advisory Group (CAG). Although PRPs and members of the local business community are to be included on the CAG, environmental and public interest groups are not explicitly required to be included. In addition, the bill fails to grandfather the over 200 existing Advisory Boards at Federal Facility sites, further disrupting and delaying cleanups.

2. *Remedy Selection Criteria.* More significantly, the remedy selection criteria include the acceptability of the remedy to the affected community, as represented by the elected officials of the affected local government. The elected officials do not necessarily represent the views of all residents within the community, particularly minority or disadvantaged groups that may be affected by the Superfund site more than others. Drafting this remedy selection criterion in this manner purposefully excludes the comments of citizens that are not the same as the comments of the elected officials. The opinions of all residents who provide comments should be given full consideration under the selection criteria.

H.R. 228 establishes advisory boards at Superfund sites. These advisory boards reflect the racial, ethnic, and economic makeup of the community and include all community elements affected by the cleanup. The advice and preferences of these groups would be solicited at every stage of the cleanup process and would be accorded substantial weight in remedy selection and land use decisions.

OTHER CONCERNS

The problems discussed above are not a complete list of problems in H.R. 2500. The bill significantly restricts restoration of natural resources injured as a result of hazardous waste contamination. Further, the bill prematurely ends Federal involvement in the effort to cleanup hazardous waste sites by mandating that only 125 more sites may be added to the National Priorities List (NPL). EPA estimates that the number of sites that meet the eligibility criteria for NPL listing is over 700. Without continued Federal involvement, these sites will become the responsibility of State and local governments that may not have the resources to address them.

Restrictions on Federal authorities at non-NPL sites are also problematic. For example, H.R. 2500 states that no enforcement order at an non-NPL site may exceed $3 million or 2 years. Indeed, orders already in effect at non-NPL sites shall cease to have force and effect once costs have reached $3 million.

Time and space prevent me from identifying in my testimony all of the concerns that the Administration has regarding H.R. 2500.

ADMINISTRATIVE REFORMS

In the absence of comprehensive reform legislation, the Clinton Administration has developed a series of administrative reforms that, to the extent allowable under current law, address problems in the Superfund program.

Previous administrative reforms have focused on promoting economic development, protecting small volume contributors, streamlining remedy selection, promoting the use of allocations and increasing the role of states.

For example, with respect to promoting economic redevelopment, EPA has already awarded 18 brownfields grants and plans to award 50 grants, at up to $200,000 each by the end of 1996. In February of this year, EPA gave a boost to property owners, bankers, developers and others concerned that their property was a potential Superfund site by removing 24,000 or about two-thirds of the sites from the CERCLIS inventory to clarify that EPA has no further interest in these sites.

Earlier this month, the Clinton Administration announced its third series of administrative reforms. These reforms include the following:

- Control remedy costs and promote cost-effectiveness (e.g., establish an EPA National Remedy Review Board to review proposed high cost remedies).
- Ensure all risk assessments are grounded in reality.
- Foster integration of overlapping cleanup programs.
- Reform NPL listing and deletion policies.
- Increase fairness in the enforcement process (e.g., compensate settlors for a portion of the orphan share).
- Reduce transaction costs (e.g., increase the number of protected small contributors).
- Ensure that States and communities stay more informed and involved in cleanup decisions.

Appended to my testimony is more complete information about these administrative reforms.

Finally, EPA is also developing a package of Administrative reforms specifically designed to address the needs of Federal agencies.

CONCLUSION

The Clinton Administration believes that legislative reform of the Superfund program is necessary to remedy some inherent problems in the existing statute. Throughout the 15 year history of the program, the criticisms are continuously repeated—the liability scheme is not fair, transaction costs are too high, cleanups are too slow, and the community is not involved in decisionmaking. H.R. 2500 does not solve these problems.

But the Administration is committed, and I personally am committed, to working with the Congress over the coming months to develop a bill that does solve the major problems with Superfund and to ensure that meaningful reform is enacted.

Mr. Chairman, thank you for this opportunity to address the Subcommittee. Now I will be happy to answer any questions you or the other Members may have.

Mr. OXLEY. Thank you.

The committee will stand in recess for 15 minutes. We have two votes back to back.

[Brief recess.]

Mr. OXLEY. The subcommittee will come back to order.

Sorry for the inconvenience. You've been through this drill before.

I'm sorry I did not take the opportunity to introduce Elliott Laws, head of the Superfund program, when you initially were introduced. Welcome, Mr. Laws. This is not the first time either one of you have been here. It's good to have you back.

The Chair would propose some questions. By the way, we will try to stay to the 5-minute rule because of votes on the floor and recognizing the administrator's time constraints as well.

Administrator Browner, you recently announced a set of administrative reforms to the Superfund program which your testimony briefly addressed. Let me ask you some questions based on those administrative reforms.

Aren't your administrative reforms basically an admission that the Superfund statute is badly flawed?

Ms. BROWNER. Mr. Chairman, we have no disagreement with the need to make changes in the statute. We have provided to the committee members, Mr. Chairman, a document, which actually looks like this, listing the 3 phases of administrative changes.

In virtually every instance what we are doing administratively could be more easily done if Congress would change the law. For example, we are presently, through a complicated set of steps, protecting banks that want to make loans on contaminated sites so redevelopment and cleanup can occur. Congress could say banks are not liable. So we don't disagree with the need to change the law and believe that in virtually every instance our administrative reforms could be more expeditiously and quickly achieved with changes in the law.

Mr. OXLEY. Indeed, most of the bankers that we have talked to tell us time and time again they need legislative relief because there is only so far you can go in a regulatory site.

Do you agree that we need Superfund reform legislation this calendar year?

Ms. BROWNER. Mr. Chairman, we believed we needed it last year. We certainly believe that we need the law to be changed. We need the right changes to the law. We will work with you. We will work in a bipartisan manner to get the right changes to the law. We would like to see it changed this year.

Mr. OXLEY. You are willing to give the administration's efforts towards that end?

Ms. BROWNER. We are more than happy to work in an honest, open dialogue, a bipartisan dialogue. In the Senate we have probably spent close to 100 hours now in that kind of forum. We have spent a lot of time with the chairman. We would be more than happy to do that here, to make ourselves available in a forum with both Democrats and Republicans to move forward.

Mr. OXLEY. You were here in March of this year and you said at that time in your statement, "No one disagrees with the need to make the system fairer, to make it more rational. We agree that the Superfund net has been cast far too wide, that people are trapped in the liability scheme who do not belong there, and they should be protected."

H.R. 2500's liability provisions go directly at the heart of your comments. Are you prepared to support those provisions?

Ms. BROWNER. We have concern, Mr. Chairman, with how you provide those protections. Let me highlight one in particular. As we understand your bill, there is this 1 percent definition. If you are responsible for 1 percent or less of the waste, then you are out. We have 2 concerns about that. One is a logistic concern.

We are going to drag a lot of people through the allocation system and then take them out. Why not take them out on the front end? That was what last year's bill did. It drew a bright line. It said you were out. It was a volumetric type approach.

The second problem we have with the 1 percent proposal is the fact that at some sites 1 percent is not an insignificant amount of toxic waste. We can provide a detailed list to the committee. There is a site called Bypass 601. Ninety percent of the parties there will

in fact be at 1 percent. Yet the volumetric equivalent of 1 percent is 3.4 million pounds.

So we would encourage you to adhere to your commitment and our commitment to take more of the small parties out, but we would recommend that you do it with a bright line, that it is not something we will litigate; it is not something we will have to drag people through the allocation process to achieve; it will simply say in the statute who is in, who is out.

Mr. OXLEY. As you know, the NFIB is going to testify at a later panel. I would suspect they would be glad to hear that commitment, because that basically is our goal anyway, particularly as it relates to the 1 percent situation as well as the de micromis language, which, as you know, was contained in last year's provisions as well.

I am going to follow the rule and stick to the 5 minutes and recognize the gentleman from Oregon, the ranking member.

Mr. WYDEN. Thank you very much, Mr. Chairman.

Ms. Browner, I thank you for a very helpful presentation. I am concerned initially about the new risks that this bill seems to impose on the typical American citizen. Chairman Oxley recently said that ROSA's cutbacks in liability wouldn't impose any new burden on the American people. He said that the same businesses that are paying for Superfund cleanups under the current liability scheme would continue to pay for cleanups through the taxes they pay into the Superfund trust fund. So in effect the argument was Joe Citizen wouldn't be affected. When I look at the bill, it doesn't look that way to me.

In your opinion, what impact would there be in this bill on the typical American citizen?

Ms. BROWNER. The concern that we have is related to the cost of the bill. Right now there are taxes that generate approximately $1.5 billion a year that go into a trust fund for the Superfund program. We believe, based on our preliminary analysis, that the cost of this bill when you take into account the rebates is in excess of $2 billion. We don't understand where that money is going to come from other than the general treasury, which obviously means the taxpayers as opposed to the tax that is collected currently from the oil and chemical companies.

We are also, as I said in my opening statement, troubled by the fact that the leadership in this body has seen fit to recommend only $1 billion for the program in the EPA budget this year. That is a third reduction in the budget of previous years. So the cost of the program will go up while the budget goes down.

Mr. WYDEN. I appreciate that. I find very troubling that that typical American citizen that we are talking about either faces 1 of 2 choices, either getting shellacked as it relates to that $2 billion more that you say would be needed, or accepting a rollback in environmental protection. That doesn't seem like much of a choice to me.

Ms. Browner, with respect to the retroactive liability discount notion, this scheme that is in the bill, is any distinction drawn there between the responsible corporate actor who will step up and take responsibility for pollution they caused and those who drag their feet?

Ms. BROWNER. As we understand the rebate provisions of the bill, it is available to all parties, and in fact we are very concerned about how we will be able to appropriately audit the submissions that we will receive from parties prior to making the payments. I believe there is a requirement that we pay out in a 6 month period.

As someone who has been involved with government for a long time, I think we are all well aware that there are some things, quite frankly, that government does well and there are other things that government doesn't do very well. Auditing these records, figuring out whether it was 1 dump truck or 2 dump trucks, then making a payment is something probably that government doesn't do very well. It is a cumbersome process that we think is open to significant fraud and abuse.

Mr. WYDEN. I appreciate your clarifying it, because last year's bill seemed to try to provide an important incentive for good corporate citizenship, and based on your answer, that seems missing.

Finally, my friend Mr. Oxley said that his legislation would result in "no more lawyers, only cleanups." I looked, for example, at the impact of reopening hundreds of records of decisions. For example, allowing these decisions to be challenged in court. This looks to me like a lawyer's full employment program.

What is your assessment of this matter of more lawyers, delayed cleanups, these sorts of issues?

Ms. BROWNER. We share the concern. There are 700 ROD's that would be eligible for reopening. That means at least 700 lawyers, but if the law firms operate the way they have heretofore, it is probably more like 7,000 lawyers. It also means the government will need more lawyers. We have to be there. The courts will force us to be there. There is a burden on the court system as all these cases move back in. And that's just one element of increased litigation.

In addition to the ROD reopening, the decisions that have already been made, every single one of them eligible for a judicial review, the bill has other opportunities for increased and expanded litigation.

Mr. OXLEY. The gentleman's time has expired.

The gentleman from Idaho, Mr. Crapo.

Mr. CRAPO. Thank you, Mr. Chairman.

I would like to state at the outset to Ms. Browner and to Mr. Laws that although we have some very significant differences of opinion on how the program should be administered, I do have to say that you have been very responsive throughout the time that I've been trying to work with you on very specific issues as well as general issues. I do want you to know that I appreciate that.

And now I want to get into one of our big differences.

As you are aware, I am very concerned about the lead and soils issue and the IEUBK model. I want to talk about the memorandum that we received that came out recently, because it was very disturbing to me see.

As I interpret the memorandum, apparently there was a high level of concern at the EPA over whether the SAB review of the IEUBK model will embarrass the Agency or will have impacts on the decisionmaking as to how it should be used. I want to quote from the memorandum. It says, "The Superfund program views the

possible SAB review with the utmost concern because of the grave implications it could have for the Superfund program. The potential SAB review has major policy, enforcement and political implications for the Superfund program, and the IEUBK model for lead inevitably would be scrutinized by the economics panel because it is an integral part of the economic analysis. There is little doubt that an SAB review could have serious consequences for Superfund reauthorization."

As you know, I've got very big problems with the Agency's use of this unvalidated model and the fact that there are widespread reports that the model does not accurately predict blood levels, and some concern about whether the Agency uses the default values in the model even when it has site-specific values.

I interpret this memo to mean that the Agency is dead set on validating or using this model whether it is validated regardless of what happens and that there is what appears to be an effort not to have an SAB review.

I guess my question is, what is the status of the SAB review and will it be conducted?

Ms. BROWNER. Mr. Crapo, you are not the first person to raise this memo. I have taken the time to read the memo. I think if you read it in its entirety, what you will see is a process that is working as it should.

What has happened is that within EPA the scientists looked at how to develop a model, looked at the existing model and whether changes should be made. When higher level people were brought in, they said, we don't think we've done the quality work we should. Go back and make sure this is the best science we can do, and then we will absolutely, positively submit this to peer review.

There is no effort here to deny a peer review of this model, but rather there is an effort on the part of the scientists in the Agency to ensure that they have done their job thoroughly and appropriately.

In talking to others who have raised this particular memo, what has become clear to me is there are some who suggest and I don't want to suggest that you are one of them, that somehow or another lead is not dangerous, and I don't agree with that. We will certainly submit the documents to peer review when the internal Agency process has been completed. There is no effort here by anybody to deny an external peer review.

Mr. CRAPO. Part of the reason that many of us have that concern, and I am quoting from the memo again, is that it says, "Portions of the draft report are flawed technically and public review by a competent body of experts will be embarrassing to the Agency."

Ms. BROWNER. Right. We agree. High level people in the Agency didn't believe the Agency had done the quality work it should have done and went back to the technical people and said, do your job. That's all that happened.

Mr. CRAPO. In other words, there will be an SAB review?

Ms. BROWNER. Absolutely, positively.

Mr. LAWS. Just to clarify, Mr. Crapo, the memo is not referring to the IEUBK model; it's referring to an economic analysis that was performed and utilized.

Mr. OXLEY. The gentleman's time has expired.

Mr. CRAPO. Could I conclude one question, Mr. Chairman?

Mr. OXLEY. Yes.

Mr. CRAPO. We have asked you today in written correspondence if you could provide us with a number of documents.

Ms. BROWNER. I was just handed that. Right.

Mr. CRAPO. I would like to follow up on that and ask again publicly that you provide the draft ABT report and all the internal documents of the Agency dealing with this issue.

Ms. BROWNER. If you are referring to the letter we were just handed about an hour ago, we are more than happy to do that. Absolutely.

Mr. CRAPO. Thank you.

Mr. OXLEY. The gentleman's time has expired.

The gentlelady from Oregon.

Ms. FURSE. Thank you, Mr. Chairman.

Thank you, Ms. Browner, for being here.

In your testimony did you say that a person such as the captain of a ship like the Exxon Valdez who is willfully negligent would have the benefit of the $50 million cap for damage that he or she caused? Is this true under their bill?

Ms. BROWNER. Right. There is a provision in H.R. 2500 that speaks to willful negligence. In other words, it protects you even if you are willfully negligent in operating a vessel that causes natural resource damage because of a spill.

Ms. FURSE. So your analogy to the Exxon Valdez under different law would be the same?

Ms. BROWNER. Right.

Ms. FURSE. I'd like to ask you a different type of question. As you know, there are sub-populations in this country who have very different lifestyles, culturally dominated lifestyles. I am thinking now of the Native American tribes, for instance, in the Pacific Northwest, who eat a great deal more fish than do other populations in the Northwest. I am concerned about H.R. 2500 and its impact on Indian health, and I want to quote from testimony from the Umatilla Tribe and ask your comment on it.

In their testimony they say, "American Indian uses of natural resources are unique exposure pathways and present problems too complex for risk assessment. The cost-benefit analysis would be too difficult under these conditions. Under the Oxley bill, the protection of human health will not include the health of my family and my community."

Can you comment on this and whether in your view the health of sub-populations like Native Americans and also sub-populations like children and pregnant women will be adequately protected under H.R. 2500?

Ms. BROWNER. H.R. 2500 does not include a sensitive sub-population provision. There was such a provision included in H.R. 228. We are further concerned, as it relates to sensitive sub-populations, that the cost of health protection requirements could result in a disproportionate impact on certain segments of the population. Moreover, as we read H.R. 2500, there are no protections for non-cancer risks, and I think the issues that the tribe has raised are in fact probably non-cancer risks.

Ms. FURSE. So you think that these special groups' health might not be adequately protected under this new bill, whereas the bill last year did protect those subgroups adequately. I am thinking very clearly, of course, of Native American populations, but also when you think of children and pregnant women, other special groups who need some specific protection.

Thank you, and thank you, Mr. Chairman. I yield back the balance of my time.

Mr. OXLEY. The gentlelady yields back.

The gentleman from Louisiana, Mr. Tauzin.

Mr. TAUZIN. Thank you, Mr. Chairman.

Ms. Browner, I want to quickly go to the memorandum again. The memorandum that was quoted to you says that an SAB review could have serious consequences for Superfund reauthorization. What kind of consequences are you concerned about for scientific review of that model?

Ms. BROWNER. Mr. Tauzin, I didn't write the memo.

Mr. TAUZIN. What kind of consequences is the fellow in your Agency who wrote this——

Ms. BROWNER. I think it was written by a woman.

Mr. TAUZIN. Whoever it was. I don't want to quibble with you. What kind of consequences are you all concerned about for Superfund reauthorization in a scientific review of a technically flawed document?

Ms. BROWNER. Mr. Tauzin, first of all, that document which you are referring to is about an economic analysis, a model, which people within the Agency have expressed concerns regarding. You have concerns; people within EPA had concerns. People were asked to revisit the document, and then it will be submitted for peer review. It will absolutely, positively be submitted.

Mr. TAUZIN. So you are repudiating this memo that says you are afraid of a competent body of experts doing a public review of this.

Ms. BROWNER. No. Absolutely not. It will be submitted for peer review.

Mr. TAUZIN. Second, did you today actually criticize this bill on the basis that it will now cap liability for an Exxon Valdez spill cleanup at $50 million?

Ms. BROWNER. Not the cleanup. The natural resource damages.

Mr. TAUZIN. Did you actually criticize it for that?

Ms. BROWNER. What I said was——

Mr. TAUZIN. What is the status of the current law in that area?

Ms. BROWNER. What I said is if the Exxon Valdez had been carrying hazardous waste. I did not say if the Exxon Valdez were to have spilled oil. I said if it had been carrying hazardous waste.

Mr. TAUZIN. You see, the problem when you raise the Exxon Valdez, you make it look like this new bill suddenly affects liability for vessel spills when it does not.

Ms. BROWNER. I was very clear on what I said.

Mr. TAUZIN. In fact, the current law provides "liability for release of hazardous substances shall not exceed for any vessel $300 per gross ton or $5 million, whichever is greater." Isn't that correct?

Ms. BROWNER. The point I was making——

Mr. TAUZIN. Current law limits the liability to $5 million or $300 per gross ton; isn't that correct?

Ms. BROWNER. Mr. Tauzin, I was making 2 particular points about the bill.

Mr. TAUZIN. Would you answer that question first?

Ms. BROWNER. One is hazardous waste and second is willful negligence. That is our understanding of this bill.

Mr. TAUZIN. Let me again ask the question and maybe ask you to answer it, please. Isn't the current status of the law that release of hazardous substances from any vessels is now protected by a limitation of $5 million or $300 per gross ton?

Ms. BROWNER. Except when there is willful negligence.

Mr. TAUZIN. Does this bill make any change in that provision?

Ms. BROWNER. As we understand it, the willful negligence is changed for hazardous waste.

Mr. TAUZIN. That is absolutely incorrect.

Ms. BROWNER. That is our reading of it.

Mr. TAUZIN. Let me go to your arguments in your statement to us that this would somehow allow the government to simply erect a fence. You state on page 6 of your testimony, "Also not specified as a risk reduction benefit is long-term effectiveness and reliability."

I want to read the bill to you. The bill says, "The President shall select appropriate remedies by considering and balancing under paragraph 2 the following factors: effectiveness of the remedy, including implementability and technical practicality, and second, reliability of the remedy over the short and long term."

The bill currently provides for both effectiveness tests and short- and long-term reliability. Your statement says nothing in here specifies effectiveness or long-term reliability.

I want to quote to you from last year's bill that you came here to promote. It says the same thing, "The President shall consider balancing the following factors: the effectiveness of the remedy, its long-term reliability and its short-term risk."

It also further goes on in last year's bill exactly as the current bill to include reasonableness of the cost of the remedy.

Why is it in your critique of this bill you make a statement that the current bill does not provide for effectiveness and reliability when the exact language of last year's bill is included in this bill?

Ms. BROWNER. Mr. Tauzin, this is a 240 page bill. My comments speak to the bill in its entirety. It is our professional judgment that under this proposal when taken in its entirety there will be sites in this country where we will not be able to clean them up in a permanent way, where we will not be able to provide adequate public health protection.

Mr. TAUZIN. My time is up.

Ms. BROWNER. That's my judgment.

Mr. TAUZIN. I appreciate that. What you are saying is that you have a judgment, a characterization of the total effect of the bill.

Ms. BROWNER. I have a professional judgment.

Mr. TAUZIN. I understand that, and you are certainly entitled to that. What I am concerned about is statements that are made in critiquing the bill criticizing language that you say is not in the bill when it's in the bill just as it was last year. That concerns me, and I only ask that as we go through this process we at least look at the language and criticize the language if it's missing. When it's

there in both bills, how can we possibly criticize it for not being there when the clear reading of the bill says it's still there?

Mr. OXLEY. The gentleman's time has expired.

Ms. BROWNER. Mr. Chairman, may I make a brief comment?

Mr. OXLEY. Let me recognize the gentleman from Massachusetts. I'm sure he will give you adequate time to respond.

Mr. MARKEY. Let us move on to a series of questions that I think can help to illuminate the debate.

Under the terms of this bill those responsible for the pollution will be getting rebate checks from taxpayers for millions of dollars; is that correct?

Ms. BROWNER. That's our understanding.

Mr. MARKEY. Isn't it true that this will occur even where they have signed judicial consent decrees to pay for or to perform the cleanups?

Ms. BROWNER. Correct.

Mr. MARKEY. Isn't it true that polluters will be eligible to receive these rebate checks from American taxpayers even where they have already signed judicial consent decrees to pay for or to perform the cleanups?

Ms. BROWNER. That is our reading of the provisions, yes.

Mr. MARKEY. Isn't it true that polluters could get these rebate checks from American taxpayers for liability relating to releases of hazardous substances that occurred after the original Superfund law passed in 1980, after the polluters clearly knew that they were liable under Superfund?

Ms. BROWNER. That is our reading. As we understand it, the provision is pre-1987; Superfund was passed in 1980; so you do have a period of time.

Mr. MARKEY. Under H.R. 2500, could someone get a multimillion dollar rebate check from American taxpayers for activities that resulted in the release of hazardous substances even though these activities arose from the negligent conduct of the polluter?

Ms. BROWNER. As far as we can tell, there is no test in terms of causation; there is no provision that says if you acted in a certain way you are not eligible for the rebate.

Mr. MARKEY. So they could get the benefit of the Ed McMahon Sweepstakes Lottery as well.

Ms. BROWNER. Yes.

Mr. MARKEY. What if the release and the contamination was the result of activities that were grossly negligent. Would they still get a check back from the American taxpayers even though the polluter was responsible?

Ms. BROWNER. That is our reading, yes.

Mr. MARKEY. How about if they were the result of willful conduct to dump the toxic waste but the polluter was not criminally convicted. Would they still be eligible for a rebate check from the American taxpayer?

Ms. BROWNER. Yes.

Mr. MARKEY. What if a company's own attorneys had informed them that they could be held liable for the cleanup under other laws such as nuisance law or State water quality laws. Would they still be entitled to receive a Federal taxpayer rebate check?

Ms. BROWNER. Yes.

Mr. MARKEY. I, for the life of me, don't understand why our committee would be spending American taxpayer dollars to clean up messes created by individuals or companies that they have admitted to and agreed to clean up if we have a limited amount of funds that will be available and we are going to need them for the sites that we may not be able to find responsible parties but yet for public health and safety reasons will still have to be cleaned up. It seems to me that it's a foolish waste of limited Federal dollars to be giving bonus rebate checks to those who are obviously liable.

While you have done an excellent job in fact cleaning up more sites now in 3 years than the previous 12 years of Reagan and Bush administrators had done, we can't forget that Rita Lavelle went to jail for her activities as the Deputy Enforcement Director, that Ann Burford had to resign because of the controversies around her enforcement, that Robert Perry, who was the Chief Counsel of EPA, was forced out because of his misconduct, that all of this is part of a legacy that you've done an admirable job in cleaning up.

One final question. What have you done in terms of the whole question of remedy costs and using more cost-effective remedies generally to clean up the sites in the last 3 years?

Ms. BROWNER. The administrative reforms have included a number of efforts and initiatives to reduce the cost of cleanups. Beginning with reform one, you see that we issued a series of guidance and presumptive remedies. Essentially what that means is we have learned from the history of the program. We know how to do some sites. There is a recipe; you take it off the shelf; you use it; you get the job done more quickly; you get the job done for less money.

Throughout our administrative reforms we have continued to look for how to reduce the actual cost of cleanups. We believe when fully implemented our administrative reforms will reduce the cost of cleanups on an average by 20 percent.

Mr. OXLEY. The gentleman's time has expired.

Mr. MARKEY. I want to congratulate you on the excellent job you have done.

Thank you, Mr. Chairman.

Mr. OXLEY. Before I recognize the gentleman from Iowa, I would simply point out that I know my friend from Massachusetts is concerned for the taxpayer, but let's understand the source these taxes come from. They come from the chemical industry, the oil industry, indeed the polluters, and the environmental income tax, and I think this perception out there that the gentleman is trying to portray, that Joe six-pack and his wife are paying these taxes, is not only inaccurate but terribly misleading.

Mr. MARKEY. Would the gentleman yield?

Mr. OXLEY. I yield to the gentleman.

Mr. MARKEY. That's absolutely incorrect. There is a quarter of a billion dollars coming from general revenue for this purpose. That's not accurate. In addition, the chemical companies and oil companies and others that kick in clearly pass that on to the American consumer. By the way, a lot of these chemical companies have not polluted. They are taxpayers.

Mr. OXLEY. I'm glad to see the gentleman recognizes that those corporations pass that on to the consumer, and I know he has a great deal of concern for the consumer as well. That's how the sys-

tem works and that's why everybody pays for this flawed program and not just the companies involved.

Mr. MARKEY. But there is a quarter of a billion dollars of general revenues as well. I think it's inaccurate for you to be accusing me of misleading, Mr. Chairman.

Mr. OXLEY. I now recognize the gentleman from Iowa.

Mr. GANSKE. Thank you, Mr. Chairman. I am glad that my colleague from Massachusetts is here, because I always enjoy his opening statements. And also I appreciate Ms. Browner being here, because both of you talked a lot, in your testimony and in some other opening statements, about Evian water and fences.

Mr. WYDEN. Would the gentleman yield to me for one quick second? I would hope the Chair wouldn't take it out of his time.

Mr. GANSKE. We've got a vote on, and I would like to get through a question. However, I yield to you for 30 seconds.

Mr. WYDEN. We wish to work in a bipartisan way, but the point is Ms. Browner told me she didn't know where $2 billion was going to come from. We're concerned that's going to affect the taxpayer. I appreciate the gentleman yielding.

Mr. GANSKE. My understanding, Ms. Browner, is that you are fairly positive on H.R. 228.

Ms. BROWNER. Yes.

Mr. GANSKE. I would like to go through a few of the specific examples of how close I think in many instances H.R. 2500 is to H.R. 228.

You claim that there is a big problem when ROSA uses the terms "reasonable" and "costs," but there also is a lot of that in H.R. 228. Let me give you a few examples.

On page 178 of H.R. 228 it states in relevant part that "national goals shall provide the basis for protective concentration levels unless the attainment of such goals is technically infeasible or unreasonably costly."

ROSA does not contain this language or this exclusion. Can you tell me what this means and why this language that is in H.R. 228 does not compromise the protection of human health like you've claimed H.R. 2500 does?

Ms. BROWNER. It is important when dealing with proposed legislation that we look at these bills in their entirety. That is what we have done. In it's entirety, we do not believe that H.R. 2500 provides the public health and environmental protections that H.R. 228 in fact provides.

I'm sure we could spend a lot of time going through sentence by sentence, but the reality is when it comes time for us to implement the statute we don't get to pick the sentences. We are left with the statute in its entirety, and taken in its entirety, we do not believe the bill provides the public health and environmental protections that any responsible toxic waste cleanup program should.

Mr. GANSKE. I understand your answer and it's very similar to your answer to Mr. Tauzin. In order to build up an analysis of a particular bill you do have to look at the aggregate of specific parts.

Let me give you another example. The general 5 factor test in H.R. 228 on page 196 and the 7 factor test for groundwater in H.R. 228 on page 200 uses the term "reasonableness of the cost of the remedy."

Also, on page 186, H.R. 228 provides an exclusion that states that groundwater with low levels of contamination need not meet the goal of drinking water standards if achieving such goal would be unreasonably costly. High levels of contamination, on the other hand, would have to meet drinking water standards in the groundwater unless technically impracticable from an engineering perspective.

Once again, we are dealing with basically trying to get to the issue of some type of reasonable cost-benefit analysis. It's in H.R. 228. There are also similar sections in this bill. I would give you a minute or so to respond to that.

Ms. BROWNER. The concern we have with the groundwater provisions in H.R. 2500 when taken in their entirety is the permanent contamination of drinking water supplies. One of the most difficult issues has been the cleanup of groundwater. Ensuring that groundwater, which 50 percent of the American public count on for the water they drink every day, is cleaned up, is protected is something we think is fundamental to the public health protections that this program should embody. As we read H.R. 2500, there is language about point of source. In other words, put something on the tap, deliver bottled water. I, for one, don't think that that's the legacy I want to leave my child, polluted groundwater and bottled water to drink. I don't agree with that.

Mr. OXLEY. The gentleman's time has expired.

Mr. GANSKE. If I may just make one quick statement.

Pages 14 and 15 of this bill address the issues that Ms. Browner is talking about and I think it deserves examination. Thank you.

Mr. OXLEY. The gentleman's time has expired.

We do have a vote on, but the gentleman from Washington State has already voted, so I will turn the Chair over to him.

Mr. WHITE [presiding]. Thank you, Mr. Chairman.

Thank you, Ms. Browner. I don't have the opportunity to Chair too often, so I will try not to make too many mistakes.

I think at the present time I will recognize the gentleman from Michigan, if he has some questions to ask.

Mr. STUPAK. Yes, I do. Thank you.

Ms. Browner, last week we had the State program managers testify that a number of provisions in H.R. 2500 will actually cause delay in the cleanups and they were fearful that maybe in some cases the delay may be as much as years.

Ms. BROWNER. Yes.

Mr. STUPAK. You also testified about $1 billion more in costs to you, and they were concerned about their dwindling State resources.

Could you comment on those 2 aspects? Then I might have a follow-up to that.

Ms. BROWNER. We share the States' concerns about delay in cleanups. In many instances that will be the result of increased litigation. At far too many sites where the States or EPA, or even the PRP's are ready to actually commence the work that has been waited for by the community, for years, in some instances, cleanup will now be further delayed; there will be further litigation. You are exactly right about the costs that you raise, at least $1 billion, if not more. The States who have tried and in some instances have been

able to assume day-to-day responsibility for sites and are doing a very good job; I don't believe they think they are capable of taking all of the sites in their State, or of assuming all of the responsibilities.

We have in fact heard from several States, and we would be more than happy, Mr. Chairman, to submit for the record the letters that we have received from States voicing their concerns about the provisions of H.R. 2500.

Mr. STUPAK. There has been the assertion that the GAO study found only 32 percent of the reviewed Superfund sites posed serious risk to health under current land uses. Can you comment on that? Is it 32 percent? Do you believe that to be accurate?

Ms. BROWNER. We are very concerned with the GAO report that I think you make reference to, the information on current health risks.

Mr. STUPAK. Correct.

Ms. BROWNER. It was a very limited study. It essentially took a snapshot at a particular moment in time. It gave no credit to the fact that at the vast majority of sites work had already been performed; removals had taken place; barrels had been removed. The question wasn't had a site ever posed a risk; the question was at that moment, and by taking the snapshot it ignored the activities that had gone on prior to the snapshot.

We are also concerned that in the report on page 10 the GAO itself points out that they didn't have the time. If I might read this into the record, the quote is, "Although the Agency for Toxic Substances and Disease Registry, the Public Health Service Agency responsible for identifying health problems in communities around Superfund sites, submitted information, we did not analyze the Agency's evaluation data on these sites because of time constraints."

I don't think it is fair to read this as a thorough study of the health risks associated with Superfund sites.

Mr. STUPAK. As you know, I'm a fan of risk assessment cost-benefit analysis, and this bill does address that pretty detailed in a way. It's my understanding that since you've been the EPA Administrator that you have put that forth as your Agency's criteria. Would you comment on that and then compare it to what we have in this bill H.R. 2500?

Ms. BROWNER. Cost-benefit analyses, risk assessments are some of the most valuable tools we have at EPA in shaping the decisions we make on behalf of public health protections. Whether it be in the Superfund program, drinking water, throughout the decisions that we make on behalf of public health and environmental protections those are some of our most valuable tools.

The objection we have is limiting the decision to the outcome of a single cost-benefit analysis, and ignoring the public health concerns. Unfortunately, when you apply the provisions in H.R. 2500 in terms of cost-benefit, what happens in far too many instances, in our opinion, is that the public's health is not protected, the environment is not protected.

Mr. STUPAK. Let me thank you for your testimony and let me publicly thank you for the help you've given us in Manistique Paper and the Manistique Harbor one. There was one where risk

assessment cost-benefit analysis was really the central discussion between the parties, and because of the new criteria and your leadership in your office we were able to resolve it to everyone's satisfaction in probably 18 months, which was quite good. Thank you.

Ms. BROWNER. We appreciated the work we were able to do with the citizens there. It is a good example of how to intelligently and meaningfully use these tools to reach a wise decision.

Mr. WHITE. The gentleman's time has expired.

Mr. STUPAK. Thank you, Mr. Chairman.

Mr. WHITE. At this time I would recognize the gentleman from New Jersey.

Mr. PALLONE. Thank you.

I apologize that I was not here for your testimony and most of the questions.

When I was here last week I asked a couple of questions about 2 sites in my district. As you know, New Jersey has the most Superfund sites, and my district in central Jersey has quite a few. I tried to illustrate some of the problems that I see with this legislation by pointing to the Chemical Insecticide Corporation site. I'm not expecting you to know the details about that. There were 2 concerns I had.

One is that the local residents were very concerned during the process of cleaning up the CIC site, as we call it, because essentially at this stage the EPA has put a cap over the site, which they claim is temporary, and they have fenced the site. Basically, insecticides and herbicides were manufactured over the years, and so we have this temporary solution right now.

The concern was that under this legislation there wouldn't be any requirement to go any further than that, because, first of all, under section 121(f)(2), the preference would be for the most cost-effective over the life cycle remedy; under section 121(c) there would no longer be any preference for any kind of permanent treatment; and then you would have under 121(f)(2) the incremental cost-benefit test.

Isn't it very possible that just fencing the site and a temporary cap may be it, and there wouldn't be any requirement to do anything more under this legislation?

Ms. BROWNER. That is precisely our concern under this legislation. At far too many sites a fence, a temporary cap would be deemed sufficient and you would deny the citizens of the community public health protections, and equally important, the economic redevelopment opportunities. They would not be allowed to see that site returned to productive use for the people of that community.

Mr. PALLONE. Thank you.

The second question is with regard to drinking water, again at the CIC site. You believe under 121(b)(2) that you only have to address actual human ingestion of contaminated drinking water. Again, at the CIC site, it is my understanding that the groundwater is not used. In other words, they are not using this for drinking water. So, although we have found that there is significant contamination of the groundwater, again, the way I understand this, and my question is, is that accurate, that since it's not used for drinking water there wouldn't' be any requirement to really treat the groundwater?

Ms. BROWNER. That's precisely our concern. What I am perhaps most troubled by in the groundwater provisions is who are we to tell our children that they can't drink certain water, that it will be unavailable to them. Don't we have a responsibility to provide clean, safe water for future generations, to clean up the problems that we caused? What this bill suggests is that if it's not being used today, leave it there; let someone else deal with it 10, 15, 20, 30 years from now. I don't think that's acceptable.

Mr. PALLONE. I should point out too that the biggest concern that the local residents have is that a lot of this material has polluted offsite areas and that they have made a case for offsite treatment, and I am really fearful that with this legislation that is not going to happen.

If I could just ask one more question. That CIC site is in Edison, my largest municipality. I have another landfill Superfund site called Kin-Buc, one of the most hazardous, also in Edison. My understanding is that for Kin-Buc the companies that caused the problem are in fact involved in the cleanup, and there were significant amounts of hazardous waste, chemical waste, whatever, but the site was also used historically as a municipal landfill.

The way I read this legislation, because of the co-mingling, if you will, of the municipal waste plus the hazardous material created by the corporations the corporations would no longer be liable or there would be some limit on their liability to do the cleanup and we might actually be in a situation where we have to pay them for a future cleanup, because this is not complete. Is that also accurate?

Ms. BROWNER. It sounds like the site you describe would fall under what I think is referred to as the co-disposal situation.

Mr. PALLONE. Exactly.

Ms. BROWNER. It sounds like it fits that definition. Then you are precisely right. The responsibility would move from the largest polluters perhaps in this instance to the local government.

Mr. PALLONE. I appreciate that. Thank you.

Thank you, Mr. Chairman.

Mr. WHITE. The gentleman's time has expired.

I might take the opportunity to ask a couple questions myself right now. I could probably even go on longer than I'm allowed to, but I'll try not to do that.

Ms. BROWNER. You're in control of the light.

Mr. WHITE. That's right.

Near my district, but not in my district, we have a municipal landfill site that was just recently put on the Superfund list. It's called the Tulalip site. I think it's a fairly typical situation where you have people who have dumped at the site for a period of many years, many of them fairly small participants. Now they are finding themselves faced with some fairly substantial liability.

I remember reading over the summer, at the time we first became aware of this site, some comments that you made about such sites to the effect that the administration would be very, very comfortable with a proposal to eliminate liability of such sites, and in fact we have gone ahead and done that in this bill. I think some of the other quotations I remember feeling encouraged from were your comments that this proposal goes a long way toward removing lawyers from the system, that it was a wise and informed position.

Can I take comfort from those comments that that is the administration's position today and that you agree with the elimination of liability at those sorts of sites?

Ms. BROWNER. Our position is that the small parties should be out. There should be a bright line in the statute. The homeowner who sent their garbage on Thursday mornings to the local landfill should not be trapped in the Superfund liability net. The small business. Perhaps the repair shop that was dealing with a very small amount of waste. It should be clear when they are in, when they are out, and that the largest parties should be the ones held responsible.

The problem with H.R. 2500 is it doesn't draw, in our reading of it, that kind of bright line. It doesn't clearly take people out. We would like nothing better than to do that. Under our administrative policies we have been able to take out more than 10,000 of the tiniest parties now. We are cashing out some of the other parties. They have to pay us a dollar so we can provide them the legal protection. Let's just make it simple in the statute: who's in, who's out.

Mr. WHITE. Wouldn't the simplest thing to do be just to eliminate that sort of liability all together? When I read your comments and heard those, that seemed to be what you were saying. Have you changed your mind?

Ms. BROWNER. No. I've never in any way, shape or form suggested that repeal of retroactive liability for the largest polluters is in fact appropriate.

Mr. WHITE. It would certainly be the simplest and the brightest line, though. I think you'd have to admit that.

Ms. BROWNER. I don't agree with that. I believe that there is a principle that we hold fairly strongly in this country that those who cause a problem should pay to solve the problem.

Mr. WHITE. I agree with you. I want to actually expand on that a little bit, because I think we can all agree at a certain level that the principle that the polluter pays is a good principle and one that this statute ought to be based on. On the other hand, I think one of the reasons we've had so much problem with this statute is that it's widely perceived to be unfair that those who abided by all the laws at the time that the dumping took place would later on be saddled with liability for something that was entirely legal at the time.

Let me ask you that question. Do you think that's fair or not?

Ms. BROWNER. Congress in passing the law in 1980 made a decision that it was important to clean up these sites.

Mr. WHITE. Sure. We're Congress right now and we're going to make another decision. I'm just asking for your advice to us. Do you think it's fair that somebody who abided by the laws at the time, dumped according to the laws, should be held liable for that later on in a statute passed after the fact?

Ms. BROWNER. Unfortunately, I think in many instances parties were very aware of the fact that their toxic waste was not being properly disposed of.

Mr. WHITE. That's a different issue. I recognize that. The question I'm asking is, for someone who did abide by all the laws at the time and dumped according to the proper laws and now finds itself

saddled with a big liability for doing that under a law that was passed after the fact, do you think that's fair or not?

Ms. BROWNER. I think one of the most difficult problems in this law is the resources to clean up the sites.

Mr. WHITE. So you do think it's fair?

Ms. BROWNER. If we don't ask the largest polluters to pay to clean up these sites, who would you have pay to clean them up?

Mr. WHITE. I think frankly that's a very fair response. I understand your response basically as saying it's not fair but we can't afford to do it any other way. Is that a fair characterization of what you are saying?

Ms. BROWNER. No.

Mr. WHITE. You might explain it to me then.

Ms. BROWNER. You would like me to say something that I don't agree with. I'm not going to say that.

Mr. WHITE. Maybe you could at least answer my question. My question is, do you think it's fair for somebody who abided by the laws at the time—and this is the one time when I'm really enjoying having this light here, because I do get to go on a little longer.

When they did abide by the laws at the time, the laws later changed, do you think it's fair or not? You came closest to answering the question when you said, well, we needed to pay for it. So I guess I was just trying to understand what you meant by that.

Ms. BROWNER. This is a tough question. Given the situation, it is probably the fairest thing that those who caused the damage pay to clean up the damage, even in your particular scenario where they thought they were doing the right thing. At far too many sites, people knew they were not doing the right thing; they knew.

Mr. WHITE. True. Of course that wasn't the question I asked. I appreciate it very much and I will interpret that as saying you do think it's fair or the fairest thing under these circumstances, and I will now recognize the senior gentleman from Michigan.

Mr. DINGELL. Thank you, Mr. Chairman.

This year the budget for Superfund was cut to just a hair more than $1 billion. That represents about a third cut from the President's budget request. It also is $410 million below the fiscal 1995 level.

First of all, will progress be frozen in many States and actual cleanup stopped at this appropriation level?

Ms. BROWNER. Activities that were planned will certainly not be occurring under this reduced budget. That is absolutely true at sites across the country.

Mr. DINGELL. I am going to ask that you give a more exhaustive answer to that with specific details.

Ms. BROWNER. We can provide that.

Mr. DINGELL. Can you tell us the cost of the program liability relief provisions in H.R. 2500?

Ms. BROWNER. We are completing an analysis of the total cost for H.R. 2500. Based on what we have looked at now, we believe it is at least $2.6 billion.

Mr. DINGELL. I have the figure of $1 billion per year for the codisposal exemption and the retroactive liability discount; is that right?

Ms. BROWNER. For the exemptions and the payback or the rebate it is more than $1 billion a year.

Mr. DINGELL. Your entire budget for fiscal 1995 was $1.3 billion.

Ms. BROWNER. Correct.

Mr. DINGELL. This doesn't include the cost of shifting ongoing private party cleanup and operations and maintenance costs to EPA; is that right?

Ms. BROWNER. That is correct.

Mr. DINGELL. This bill does not seem to reflect the realities of the budget. Are you concerned that if H.R. 2500 fails to fund and expedite cleanups while it mandates multimillion dollar rebates to those responsible for pollution that the consequences will be bad from the standpoint of the program?

Ms. BROWNER. Precisely. If under the current budget number of $1 billion we are required to implement H.R. 2500 and pay back the polluters, we will not have resources available to conduct the cleanup at the sites where we are the lead, where we are doing the work on a day-to-day basis.

Mr. DINGELL. I have heard that there are currently over 80 cleanups ready to begin construction but they cannot do so for want of funding; is that right?

Ms. BROWNER. Under the budget numbers right now, the $1 billion, that's precisely correct. There are 80 sites where we will not begin cleanup this fiscal year.

Mr. DINGELL. The current shortfall is $630 million just for these cleanups; is that right?

Ms. BROWNER. Yes.

Mr. DINGELL. At another 32 sites it will be delayed because the remedial design for the cleanup is left unfunded?

Ms. BROWNER. That is correct.

Mr. DINGELL. The practical result of this is that you are ready to go forward but you cannot get the design because you do not have the money; is that correct?

Ms. BROWNER. That's absolutely right. Mr. Dingell, we will provide to the committee a list of these sites where we are prepared to take shovel to dirt and will not be doing so under this budget.

Mr. DINGELL. It appears to me that we need to remedy a situation where small businesses and individuals with little or no money who sent small quantities of materials to a site are stuck in the process with all the other parties while being hit with high transaction costs. Can you tell us what the Agency is doing to address this particular problem?

Ms. BROWNER. We agree with the concerns with respect to the small parties. Under our first round of administrative reforms we have already been able to protect 10,000 of the tiniest parties. We are working to look at what we call the de micromis parties, providing protections for them in the form of a cash-out again. These are changes that this administration has undertaken. It could be more easily done with a change in the law.

Mr. DINGELL. I'd like to examine the rebate provisions which have been the subject of some light merriment in this committee this morning. If a person has innocently become a participant to Superfund cleanup, he gets back half under those proposals, right?

Ms. BROWNER. Right.

Mr. DINGELL. If he has negligently been a party, he gets back half; is that right?

Ms. BROWNER. Right.

Mr. DINGELL. If he has been grossly negligent, he gets back half; is that right?

Ms. BROWNER. Right.

Mr. DINGELL. If he has been willful, does he get back half?

Ms. BROWNER. Yes. That's our reading.

Mr. DINGELL. So a fellow who has willfully violated the law, he gets back half too?

Ms. BROWNER. Yes.

Mr. DINGELL. That would include midnight dumpers and Mafiosi and others who have participated in that kind of practice; is that right?

Ms. BROWNER. Yes.

Mr. DINGELL. I'm sure the Mafiosi will much appreciate the beneficence of Uncle Sam. Thank you, Mr. Chairman.

Mr. OXLEY. The gentleman's time has expired.

Just for the edification of my good friend from Michigan, I would refer him to page 69 of the legislation, section 313, Illegal Activities. Unfortunately, Detroit Mafioso would be excluded under this provision. "Section 107 and section 112(g) shall not apply to any person whose liability under section 107(a) is based on any act, omission or status as determined by a court of competent jurisdiction within the applicable statute of limitations to have been illegal at the time the act or omission occurred or the status existed."

The express intent of the legislation, as the gentleman knows, was to exclude illegal activity, the so-called midnight dumpers provision, and that was specifically part of the legislation.

Mr. DINGELL. Would you yield?

Mr. OXLEY. I'd be happy to yield to my friend.

Mr. DINGELL. It's always good to read the whole paragraph, as you know. If I read the whole paragraph, the last part says "section 107 and 112(g) shall not apply to any person whose liability under section 107(a) is based on any act, omission or status that is determined by a court of competent jurisdiction within the applicable statute of limitation to have been illegal at the time the act or omission occurred or the status existed."

In other words, this is a matter which has to be decided by a court, not by EPA.

Mr. OXLEY. That's a novel idea.

Ms. BROWNER. That's our problem.

Mr. OXLEY. It's a novel idea that the court would determine whether an illegal activity took place or not.

Mr. DINGELL. The practical effect of that is to guarantee that if this has not been before a court the individual gets his check in the mail. The only way that a situation where the check goes in the mail automatically can be prevented is if in some fashion or another a court has acted on the matter. So you have two universes involved here.

Mr. OXLEY. We believe in innocence until proven guilty. I'm sure the gentleman as a lawyer believes in that theory as well.

Mr. DINGELL. You have two universes of wrongdoers. Those who have been caught and taken before a court, they don't get their

money. Others who have not been caught and not taken before a court, they get their money automatically. That seems to be a rather fine distinction in the benefit of wrongdoers who meet all the tests that I've just been describing but who will get their checks simply because they have not been caught and hauled before a court at a time when the budget of EPA is reduced so much that they can't do their job.

Mr. OXLEY. Obviously the purpose is to encourage cleanup, and I think we all share that same goal. Those folks who spend money on cleanup and not on lawyers would be entitled to the rebate under the bill.

The gentleman from Georgia.

Mr. NORWOOD. Thank you, Mr. Chairman.

Ms. Browner, I have no intentions of badgering you in any way. However, I have a lot of questions and would greatly appreciate, with respect, some yes and no answers on occasion so I can get through them all.

The October 21 issue of the National Journal contained an article, Ms. Browner, by Margaret Pritz, entitled "The Superfund Saga." It started off with a story about the Arrowhead Oil Refinery in Duluth, Minnesota. The story there is really very simple. Scores of small businesses brought in their oil to be recycled, as they should have done. Now those people are each individually and collectively liable for the entire cost of the cleanup. They are subject to endless litigation and their lives and their savings are tied up in legal uncertainties.

First of all, Ms. Browner, are the recyclers I'm referring to here the people you are talking about when you say the polluters must pay for cleanup? Are these some of the people you are talking about?

Ms. BROWNER. These may be the very people we're saying you should draw a bright line in the statute and take out. I am not familiar with the National Journal article that you make reference to.

Mr. NORWOOD. I'm going to make it available.

Ms. BROWNER. Thank you.

Mr. NORWOOD. Then I presume perhaps these are some of the polluters that Mr. Markey refers to. Just some. I don't mean all.

Let's imagine just for a moment that the liability could actually be worked out among all of the small businessmen who took their oil to Arrowhead recycling facility and we could actually determine what each one of them would pay. I'm not trying to put words in your mouth, but I gather that you feel that having the Federal Government defray part of that cost, as H.R. 2500 would do, would be a bad idea.

Ms. BROWNER. I do not understand what provision in H.R. 2500 you are making reference to. Last year the administration supported an orphan share provision which would have put some of the trust fund money on the table at sites. I don't know what provision you are talking about in H.R. 2500.

Mr. NORWOOD. Where the Federal Government would help clean up in areas like this where you can't actually——

Ms. BROWNER. As we read H.R. 2500, we cannot find an orphan share provision.

Mr. NORWOOD. I think as we read it there will be some sharing in there for them. But let me quickly move on so I can get through them all.

I'd like to read just a minute from a Superfund update written by the EPA with the headlines "Cleanup of Hazardous Waste Sites Threatened." This is a document the EPA unleashed on the Internet in August. One quote from the documents says that the congressional Superfund reform proposals makes taxpayers pay for pollution rather than polluters.

My question is this. Can you tell me the 3 taxes which are paid into the Superfund trust fund?

Ms. BROWNER. Are you asking me what taxes are paid?

Mr. NORWOOD. Yes. Who pays into the trust fund?

Ms. BROWNER. There is a chemical feedstock tax, which is largely paid by the oil and chemical companies. Then there is the corporate environmental tax, which is, as I understand it, a percentage of another tax that is paid.

Mr. NORWOOD. So there are 3 of them and they pay 30, 30, 40 to fund the trust fund. So when EPA says taxpayers will be footing the bill, are you referring to the oil industry or the chemical industry or business in general, or do you mean to imply that the average citizen is paying for Superfund through income taxes?

Ms. BROWNER. The trust fund does not fund all of the Superfund program. There is a portion that comes from general revenue.

Mr. NORWOOD. Yes and no on these.

Not all of the tax revenues raised by Superfund are dedicated to Superfund cleanup or even Superfund-related activity. Yes or no.

Ms. BROWNER. I don't understand the question. Mr. Norwood, I am more than happy to try and answer your questions. Many of them do not lend themselves to yes or no answers.

Mr. NORWOOD. I apologize. I didn't ask it well. Let me try again.

Of the tax revenues raised by Superfund, not all of these are dedicated to the Superfund cleanup or Superfund-related activities.

Ms. BROWNER. The question is, what does Congress appropriate? You all make decisions every year about whether or not you're going to appropriate all of the taxes raised. That's not a decision the administration or EPA makes. That's a decision Congress makes. I'm sorry. You're asking if all of the moneys raised are spent in Superfund. Congress decides that on an annual appropriations basis.

Mr. NORWOOD. In recent years the Superfund trust fund has accumulated a surplus; is that true?

Ms. BROWNER. That is not EPA's fault. That is the Congress' decision.

Mr. NORWOOD. I'm not trying to blame. I'm just trying to see if I'm right about it accumulating a surplus which is projected to grow about $3.5 billion by the end of 1996.

Ms. BROWNER. The taxes actually expire on January 1. So without a tax renewal, the kind of surplus you are making reference to will not in fact occur. As I understand it, based on current account status, on January 1 of next year there will be approximately between $1.8 billion and $2.3 billion available in the trust fund if Congress were to choose to appropriate the money. That is based on current tax receipts.

Mr. NORWOOD. I understand. I think it's $2.7 billion, not $1.8 billion.

So this makes sense, the last part. Moneys collected by the business community for Superfund purposes have been scored by this Congress repeatedly against deficit reduction or against other non-Superfund-related programs. Therefore, if that's correct, the $2 billion that Mr. Markey refers to that he implies the taxpayers will have to pay is actually just getting the Superfund money out of the general treasury that has been put in there.

I yield back.

Mr. OXLEY. The gentleman's time has expired.

Ms. BROWNER. When you move into the scoring and budget cap issues, those are largely decisions made by the Congress.

I just want to say, on your final question you made reference to the moneys collected by the business community. I'm not sure what funds you are referring to.

Mr. NORWOOD. I am referring to the oil tax and the chemical tax.

Ms. BROWNER. Collected from. I apologize.

Mr. NORWOOD. That's who I'm referring to. And we are using it for deficit reduction. Ms. Browner, I don't know about that 103d Congress. I'm very tickled I wasn't part of that.

Mr. OXLEY. The gentleman's time has expired.

Ms. BROWNER. Well, this Congress, I will tell you, has slashed the EPA's Superfund budget.

Mr. OXLEY. The gentleman from New York.

Mr. MANTON. Thank you, Mr. Chairman.

Ms. Browner, good afternoon. I was going to say good morning, but it's dragging out here. Thank you for your testimony on Superfund and your comments on H.R. 2500.

In my own district in the Borough of Queens in the City of New York we are lucky that we have had only one NPL site to date known as the Radium Chemical site. We were also very lucky in the assessment process and the majority of the cleanup was accomplished quite quickly. A few points about the site are worth mentioning.

First, the site had significant radioactive contamination and is located close to an expressway in a well populated area of the district. It's called the Brooklyn-Queens Expressway. It's a major route in and out of La Guardia Airport and kind of connects the northerly part of Long Island at that point with the southerly part.

In fact, the Radium site was right up against the highway. You could just walk from the highway, go over the fence, and you would be on the roof literally of the site, and there were a lot of trucks and traffic and God knows what complications could have taken place if there was a crash on the highway.

A number of alternatives were considered in the remedy selection process and neither the least costly nor the most costly alternative was chosen. The selected remedy was found to protect the citizens in my district from future exposures and, importantly, enables the site to be put back into productive use.

Finally, the question. Is it your opinion that H.R. 2500 would have resulted in a different remedy selection at Radium Chemical?

Ms. BROWNER. Yes. In all likelihood it would have been a different cleanup at that site.

Mr. MANTON. What could we have expected if H.R. 2500 had been the law?

Mr. LAWS. Mr. Manton, at Radium Chemical we actually went into the site, took the radium, the radioactive contaminated material, and disposed of it. I think that H.R. 2500 directs us to look at other types of remedies, primarily exposure controls, and the costs associated with that versus the admittedly high cost of disposing of radioactive material probably would have had us do some sort of containment and exposure control at the site rather than removing the material.

Mr. MANTON. You mean something like a fence and a guard dog?

Mr. LAWS. I would hope that even with radioactive material we would have to do a bit more than a fence and a guard dog, but clearly the material probably would have ended up remaining in the neighborhood.

Mr. MANTON. Then the site would have been lost.

Mr. LAWS. Exactly.

Ms. BROWNER. Right. You would have lost the economic redevelopment opportunity because the material would have been held on site.

Mr. MANTON. Does H.R. 2500 allow for remedies to be selected according to State laws which govern cleanups?

Ms. BROWNER. With one exception, discharges to navigable waters, State standards are preempted. As we read the bill, they are preempted.

Mr. MANTON. Doesn't that preemption of State standards contradict the goal of dedicating more to the States and trusting that the States know best?

Ms. BROWNER. As a former State director, I certainly think it does.

Mr. MANTON. Thank you. I yield back.

Mr. MARKEY. Would the gentleman yield?

Mr. OXLEY. The gentleman's time has expired.

Mr. MANTON. Mr. Chairman, I yield to the gentleman if I have the time.

Mr. OXLEY. Yield to your consigliere?

Mr. MARKEY. I thank you. Just so we can make clear what we are talking about, in this year's Senate appropriations bill 100 percent of the costs for funding Superfund will come from general revenues, which means all taxpayers.

Ms. BROWNER. It's our understanding that's what the House did. The Senate actually took it from the trust fund. The House, however, took all of it from general revenue, as we understand it.

Mr. MARKEY. All of it from general funds, which is the general taxpayer.

Ms. BROWNER. Right.

Mr. MARKEY. Just so that we keep these dollar figures in the right pile in terms of who is paying and who is going to get the benefit, the rebate checks in the future that they are going to be handing over to the polluters who had already agreed in many instances to clean up the mess that they had created are most likely going to come disproportionately just from ordinary citizens.

Mr. OXLEY. The gentleman's time has expired.

There is $3 billion in the trust fund. I think that speaks for itself.

The gentleman from Ohio.

Mr. GILLMOR. Thank you, Mr. Chairman.

Administrator Browner, as we all know, the Federal Government and Department of Defense in particular is one of the worst polluters in the country. DOD has embarked on an aggressive plan which is outlined in the Task Force on Defense Environmental Response where they focus on achieving actual cleanup. They went from spending, as I understand it, in 1992, 63 percent on studies and only 37 percent on cleanups to the current level of 68 percent on cleanups and 32 percent on studies. Is there any reason that EPA could not achieve those standards or better, and what is the current EPA breakdown on that?

Ms. BROWNER. In fact, we have done virtually the same thing. As is true any time you undertake a new program, before you are able to move the bulldozers, to put the shovel to dirt, you need to do the studies. So in the early phases of the program you will have more dollars going to studies, but that has in fact reversed itself within the program and now the moneys primarily go to the cleanups.

Mr. GILLMOR. Can you give us some hard and specific figures on that? It's my understanding you only had $240 million going toward actual cleanup, which I think would be a significantly smaller percentage.

Ms. BROWNER. No. Of the approximately $1.3 billion or $1.4 billion that has been appropriated, $900 million go towards cleanups. Roughly 70 percent go towards cleanups. That includes, just to be clear about this, things like emergency responses where we are notified that there has been illegal dumping and we have to go out expeditiously and undertake actions for public health protection.

We have several charts. With the chairman's permission, we would be more than happy to submit them for the record.

Mr. GILLMOR. I would appreciate that. Thank you.

In your testimony earlier you claimed that because H.R. 2500 specifies a risk range for carcinogens that threats posed by non-carcinogens, and specifically I think you mentioned kidney disease and nerve damage, are not covered as a risk reduction benefit under the bill.

That's a pretty provocative statement and I think it's one that is totally inconsistent with the language of the bill, because in ROSA it is stated over and over again protection of human health from realistic and significant risk. There are numerous statutes that use the terms "risk" or "protection of health" that kidney disease and nerve damage fit under.

What are you basing this novel and, I would say, unique interpretation of the English language to say that these 2 things are not affecting human health?

Ms. BROWNER. I believe you are referring to my written testimony.

Mr. GILLMOR. Yes.

Ms. BROWNER. The point we are making is that the bill is silent on other health risks. It specifically mentions cancer and does not speak to other health risks in the way that last year's bill did. If

it is the committee's intention to specifically speak to all of the health effects associated with Superfund sites, then the law should so state. Do not force us to litigate that point if that is your intention; clarify the law; don't just say cancer; say the other health risks.

Mr. GILLMOR. In other words, you're telling us that in your professional judgment unless you specifically list everything like nerve damage, earaches, whatever, that it's not covered as a definition of human health?

Ms. BROWNER. I'm telling you that we will litigate and perhaps lose our argument that this would go beyond cancer. If it is your intention to protect the public's health, I say to the committee, write it in the statute that it is cancer and all health risks. Don't list earache; all health risks. We will win our case then.

Mr. GILLMOR. Since the language in the bill talks about protection of human health and since there are other statutes that do that, could you give me one case where that language has been interpreted by a court to exclude kidney disease and nerve damage?

Ms. BROWNER. The current statute says "human health." You are changing the current statute to say "cancer." I would strongly recommend that if it is your intention to go beyond cancer that you be explicit in giving us the authority to protect for all health risks.

It sounds like we don't have a disagreement here. You're saying that was your intention. I'm merely recommending that 3 words be added to the statute.

Mr. GILLMOR. Which are "protect human health"?

Ms. BROWNER. Human health risks; all human health risks. Not protect human health; non-cancer human health risks. If that is your intention, you should write it in the statute.

Mr. GILLMOR. I see my time has expired.

Mr. OXLEY. The gentleman's time has expired.

I would only point out that the original statute specifically talks about protection of the environment and human health.

Ms. BROWNER. Right.

Mr. OXLEY. That was the genesis behind the entire statute and there is no intention of changing that original intent, which was also reauthorized in 1986.

Ms. BROWNER. The concern we have, Mr. Chairman, is that when Congress changes a law that has been on the books 10 or 15 years and says here, for example, "cancer" is the protection that we should provide, courts will say they didn't tell you anything else; you have historically done lots of other things; now they are telling you to do cancer. This is perhaps a drafting error.

All we would suggest is that if it is your intention to allow us to provide non-cancer human health risk protection, then it would be important, since you have added cancer to the statute, to add the other. That's all we are suggesting.

Mr. OXLEY. We will work with you on that. I don't think it is beyond reason that we can work that out.

The gentleman from Ohio.

Mr. BROWN. Thank you, Mr. Chairman.

Ms. Browner, one of the great successes, maybe the greatest environmental success story of the 20th Century was the rebirth, the coming back of the Great Lakes. There is still concern, however,

with the PCB level in all of the Great Lakes, especially the lake that borders my State, the shallowest Great Lake, Lake Erie. Comment for me, if you will, on the provisions relating to the recovery of natural resources that have been contaminated or damaged by toxic waste or other waste. What will ROSA do in terms of cleaning up those PCB's that are in Lake Erie now?

Ms. BROWNER. We have the trustees here, the people who are the experts on this. If Mr. Brown is agreeable, it might be better for them to answer that question. There are within the Federal Government specific trustee agencies who are the experts on this.

Mr. BROWN. Let me ask it another way maybe that you can address. If this bill means that this will not be cleaned up, who in the end pays for it? Is that going to be paid for by Superfund under this bill?

Ms. BROWNER. If the natural resource damages are not paid for by the responsible party, who will pay for them?

Mr. BROWN. Yes.

Ms. BROWNER. I don't think they will be restored. There is no compensation; there is no means to restore them beyond the provisions for the parties, and those are capped.

Mr. BROWN. Let me shift to something that is related to that. On the National Priorities List, my understanding there is a cap in this bill of 125 sites.

Ms. BROWNER. That's correct.

Mr. BROWN. The State program managers have said in recent testimony that there are as many as 1,700 sites around the country that could and should be added to the NPL that are not now on the NPL. What will communities do with this cap of 125? Is this sort of an unfunded mandate that we are shifting this power to have to clean this up, this responsibility to the States with no Federal funding? Is that what this means?

Ms. BROWNER. There will be many sites that would appropriately be addressed through the National Priorities List that will not now be addressed. One would have to assume that that will fall to State and local government.

Mr. BROWN. Again, it goes back to Mr. Markey's comments. Are State legislatures equipped to force those polluters to clean up in those cases, or is this going to be taxpayer dollars?

Ms. BROWNER. In some instances States have adopted laws that will require the largest polluters to pay; in other instances they have not. I think this is a very difficult issue for the States. I don't think they are prepared to assume the responsibility for each and every one of these sites that will now fall to them.

Mr. BROWN. The solid waste management officials have said that there are only 5 States that have enough money to clean up even one toxic site with the average cost of, I believe, $25 million. That's what people are saying, that only 5 States even have that much. What is your recommendation, that we have a cap that is higher than this, that we have no cap? What should we do in this committee on the cap?

Ms. BROWNER. I don't believe right here and now we can say there are only so many sites left that deserve Federal attention. What we need is the flexibility to, where appropriate, bring the worst sites onto the NPL so we can address them. In many in-

stances the States can and do accept responsibility, but we need a flexible process. Let's not just say it's 125 or 130 or 140. Give us the ability to work with the States to say, can you do these and we'll do that.

By listening to the cities of this country we have already been able to remove 24,000 sites from the master list because the States, the local governments told us they could deal with it. Quite frankly, we weren't going to deal with it.

Mr. Chairman, we have for each member of the committee, if we might send this to the desk, the list of sites in their State which have now been removed from the master Superfund list. We have developed a list for each member of the committee so that they will be personally aware of which sites in their State are no longer on the master Superfund list or eligible for economic redevelopment.

Mr. OXLEY. Thank you.

Mr. BROWN. Mr. Chairman, one more comment to make sure I understand.

With this Gingrich Superfund bill, what we are basically saying is we are capping it at 125 and at the same time taxpayers' dollars are used for many of these cleanups from Superfund and most of the rest of the responsibility is turned over to the States for them to figure out how to clean it up with their taxpayers.

Ms. BROWNER. The States are certainly given an awful lot of sites that I'm not sure they are prepared to deal with, number one, nor do they have the resources to cover the cost of cleaning up the sites.

Mr. BROWN. Sort of an unfunded mandate.

Ms. BROWNER. Right.

Mr. BROWN. Thank you, Mr. Chairman.

Mr. OXLEY. I thank the gentleman. I'm sure the Speaker will be glad to know that he has been deeply involved in the drafting of this legislation.

Administrator Browner, let me clarify something on the NRD in response to questions. Under our legislation NRD restoration has a $50 million cap. We think that under most circumstances that $50 million cap from the private sector will cover restoration. Should it not, then the fund would pick up the difference.

Ms. BROWNER. We did not understand that. We appreciate that correction.

Mr. OXLEY. I just wanted to point that out for the record.

Also, as you know, section 107 that the States can use is maintained under our legislation and gives the States that tool. I would also point out to my friend from Ohio that the State of Ohio is very interested in dealing with Superfund sites and is very supportive of our legislation.

Let me turn to our friend from Kentucky, Mr. Whitfield.

Mr. WHITFIELD. Thank you, Mr. Chairman. I think we are quite fortunate to have a Speaker that writes all this legislation and is intimately involved in everything, and we are very fortunate to have him.

Ms. Browner, H.R. 2500 creates an entitlement to the funds raised through the dedicated taxes and the excise taxes in that it will not have to be specifically appropriated.

Ms. BROWNER. It still has to be appropriated.

Mr. WHITFIELD. Under this bill it does not have to be appropriated.

Ms. BROWNER. I don't sit on the appropriations committee or on this committee. Obviously that's an issue between you and the appropriators.

Mr. WHITFIELD. Just assume I am correct on that, that that is the case, that it does not have to be specifically appropriated but would be there to spend the way you all see necessary. I would assume that you would prefer that rather than having specific appropriations for this money. It would be an entitlement for the Superfund.

Ms. BROWNER. You are suggesting that the Superfund program would be an entitlement?

Mr. WHITFIELD. As it applies to the tax on the feedstocks and oil and so forth.

Ms. BROWNER. That kind of proposal has ramifications for the budget process beyond EPA. It has to do with scoring issues; it has to do with caps; it has to do with deficit.

Mr. WHITFIELD. So that type of flexibility would not be a benefit to you in your efforts?

Ms. BROWNER. I don't want to respond on behalf of the administration to this kind of proposal which has such dramatic impacts across the budget as a whole. We would be more than happy to respond in writing. This is a big budget issue. This is not a small issue about taking things off budget, creating entitlements.

Mr. WHITFIELD. Were you aware that this was turning it into an entitlement?

Ms. BROWNER. We did not understand that. No, we did not.

Mr. WHITFIELD. Thank you.

How many sites are on the NPL list today?

Ms. BROWNER. About 1,300.

Mr. WHITFIELD. It's my understanding that these individual sites are frequently divided up into operational units. Do you know how many operational units we're talking about?

Ms. BROWNER. They get divided up. The actual word we use is "operable" units. Under this administration one of the administrative changes that we have adopted is that when an operable unit's cleanup is completed, we go ahead and take it out. Historically what the program had not given anything back to a community and made anything available for economic redevelopment until the entire site was cleaned up. That didn't make sense, so we have adjusted that in our administrative reforms.

Mr. WHITFIELD. Do you all keep a running total of the operational units?

Ms. BROWNER. We'd be more than happy to provide that in writing.

Mr. WHITFIELD. But there are 1,300 sites on the NPL now. It's my understanding that there is some sort of a gauge that 1 would be maybe least hazardous, a score of 100 would be most hazardous, and that to get on the NPL you'd have to have a score of like 28.5; is that correct?

Ms. BROWNER. There is a hazard ranking system. That is a numeric system. That is correct.

We've just been told by staff that on average operable units are approximately 2 per site.

Mr. WHITFIELD. So approximately 2,600, roughly?

Ms. BROWNER. Right. We will respond in writing with the numbers.

Mr. WHITFIELD. How did you all determine what the figure would be to put a site on the NPL?

Mr. LAWS. Congressman, that was contained in the national contingency plan. There was an analysis of bringing all the information together that we have created from a site. We then rank it, and 28.5 was selected as the cutoff as to what would be placed on the National Priorities List.

Mr. WHITFIELD. Is this an objective standard or is it so specific that there is not much leeway in placing a site on the NPL?

Mr. LAWS. There is leeway. In fact, one of the criticisms we received in the early years of the program was that we were not taking into account certain pathways that were quite likely to occur, such as a soil pathway. So we modified it. But there is some leeway in what goes on and what doesn't.

Mr. WHITFIELD. Of those 1,300 on the NPL, could you just briefly give me rough numbers or a percentage that is in the study phase, remedial design and remedial action?

Mr. LAWS. They've all had some activity. I think we have over 700 where actual construction is going on.

Ms. BROWNER. We can also give you a chart.

Mr. LAWS. The remedy has been selected at over 1,000 sites. We have got design underway at 208 of those, construction underway at another 430, and construction completed at 346.

Ms. BROWNER. We have a chart we could provide for the record, Mr. Chairman.

Mr. WHITFIELD. Thanks, Mr. Chairman.

Mr. OXLEY. The gentleman's time has expired.

The Chair wishes to advise witnesses that the members of the committee will be submitting further questions in writing, and in keeping with a long-standing practice of this committee, responses to those questions are due in the committee offices within 5 legislative days after the questions are submitted.

Administrator Browner and Mr. Laws, we appreciate your being with us for about 3 hours on and off. Let me just say to you, Ms. Browner, that while we have some differences on this legislation, I think we both share a goal of getting a Superfund reform bill to the President this year. Time is of the essence, and we want to work closely with you towards that end, understanding that there is some common ground as well as some differences. That's what the legislative process is all about, and we have appreciated your cooperation over the last several months along with Mr. Laws. We hope that we can get a product that all of us can embrace, and we think we can do that this year. Thank you very much.

Ms. BROWNER. Thank you, Mr. Chairman.

Mr. OXLEY. The Chair would announce our second administration panel. Honorable Lois Schiffer, the Assistant Attorney General with the U.S. Department of Justice; Honorable Sherri W. Goodman, Deputy Under Secretary of Defense for Environmental Secu-

rity; Dr. Barry Johnson, Assistant Administrator, Agency for Toxic Substances and Disease Registry.

Our first witness is the Honorable Lois Schiffer from the Department of Justice. Welcome again.

STATEMENTS OF LOIS J. SCHIFFER, ASSISTANT ATTORNEY GENERAL, ENVIRONMENT AND NATURAL RESOURCES DIVISION, DEPARTMENT OF JUSTICE; SHERRI W. GOODMAN, DEPUTY UNDER SECRETARY OF DEFENSE FOR ENVIRONMENTAL SECURITY, DEPARTMENT OF DEFENSE; AND BARRY L. JOHNSON, ASSISTANT ADMINISTRATOR, AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY, DEPARTMENT OF HEALTH AND HUMAN SERVICES

Ms. SCHIFFER. Thank you, Mr. Chairman. My notes say good morning, but I'll actually start with good afternoon.

Mr. Chairman and members of the subcommittee, thank you for the opportunity to appear this afternoon to address the proposals of H.R. 2500 to reform the liability system of the Superfund law.

I believe that we all share a common goal for the Superfund program—as I have heard everyone speak this morning on this committee, I believe that even further—to get hazardous waste sites cleaned up as quickly and responsibly as possible. That is what the American people want and what they deserve.

I think we also share a common goal of reforming the Superfund program to accomplish this goal more efficiently without causing ancillary problems such as too much litigation, high transaction costs, and disproportionate burdens on small parties.

Unfortunately, the basic message that I have to bring to you today is that H.R. 2500 won't work to accomplish these reform goals. I might add that it is a 250 page bill that we've had for just under a week, and so I'm addressing it as best I can in that time. It won't work to clean up Superfund sites; it won't work to reduce litigation and transaction costs, and in fact it will increase litigation and transaction costs; and it won't work to get small parties out of the Superfund system. It's less efficient, it's going to slow down rather than speed up cleanups, and it's ultimately going to hurt the American public rather than help them.

Although I have a number of concerns about the provisions of this bill, for today's testimony I would like to focus on a few key aspects of the liability provisions proposed by H.R. 2500.

First, I am going to address the rebate or what I think of as the pay the polluter provision.

Second, a number of provisions will slow or really stop ongoing cleanups in their tracks, and I want to address those provisions because it's contrary to what we really want to do, which is speed cleanups along.

Third, I want to address how H.R. 2500 will create more litigation rather than less litigation and how it will inhibit rather than help settlements.

Finally, I want to extremely briefly touch on a few other provisions like natural resource damages and problems in the allocation system.

First, the liability rebates and exemption, or the pay the polluter provisions. One of the main features of this bill is the so-called ret-

roactive liability discount, the 50 percent rebate for responsible parties whose liability is based on acts that occurred before 1987.

This is a truly startling provision. Its cost is enormous. EPA estimates that the cost of this provision and the other liability carveouts in the bill will be over $1 billion a year extra, that is, beyond what is being spent now.

It gives a rebate to companies for cleaning up pollution that they caused up to 7 years after the original Superfund Act was passed, making its very name, "retroactive liability discount," false. It's paying the polluter, not a fair principle, and it will inevitably slow down cleanups since the funds for this rebate are taken out of the same pot of money and may even have priority over cleanup expenditures since these expenses have to be paid when submitted, according to the bill.

In my written testimony there are specific examples of hefty checks that would have to be sent by the United States to people who are doing ongoing cleanups now. We think is not a sensible system.

Second, I want to state that a number of provisions will slow or stop cleanups in their tracks.

First, H.R. 2500 has a provision that would allow the reopening of records of decision for ongoing cleanups. This means that those cleanups won't be ongoing any more; they will be stopped.

Second, there is a provision that lifts the bar on pre-enforcement review of cleanups. That bar has acted very effectively to let cleanups go on their way without being stopped by endless litigation. It was, in fact, a very good provision that was added when the statute was amended in 1986. H.R. 2500 takes away that pre-enforcement bar, which again will lead to litigation, which is something that we are not seeking to do here, and will slow down or stop in their tracks cleanups.

A third way in which this bill will slow down or stop cleanups is that it has very difficult provisions for implementing unilateral administrative orders. As EPA has testified in the past, more than 70 percent of cleanups are now conducted by responsible parties.

This leveraging of limited government resources is absolutely essential to the continuation and success of this program in cleaning up sites. As most people think, the private parties do a more efficient and faster job of getting the cleanups done than does the government. Yet several provisions of H.R. 2500 will make that less likely to happen. In particular, by putting serious constraints on the ability of the government to use its unilateral administrative order authority, it would severely undercut the government's ability to compel responsible parties to clean up Superfund sites and it would remove the current incentives from the law for them to do so voluntarily.

Third, the bill will create litigation rather than encourage settlement. I would like to address particularly here 2 items. The bill fails to expressly preserve joint and several liability. Joint and several liability is one of the key engines that drives settlements in the Superfund system. By failing expressly to preserve it in this statute, we will stop or slow down our ability to settle.

In addition, we all agree with the idea that we should get the little guys out of the system. I understand that the 1 percent de

minimis provision is designed for the purpose of doing that. Unfortunately, we think it has the effect of not doing that and of creating litigation. Why do I say that?

One percent of the total volume is a comparative standard. That means that in order to know whether somebody qualifies for the 1 percent cutoff you have to wait until you know what the total amount of waste is that is in contention. That sometimes takes a long time to do.

In addition, because this is an exemption rather than a settlement, it means that somebody can come along later and say that person didn't have 1 percent, and there would then be litigation about whether they did or didn't qualify for this exemption.

So while we think the intention is good, we think the execution is not good. It will lead to litigation rather than settlement and will keep the little guy in rather than getting the little guy out of the system.

Since my time is up, I'll briefly say that we think that the dramatic changes in the natural resource damage provisions mean that a lot of the areas where the Federal agencies are now trustees, particularly in those areas where they manage resources rather than own resources, there will no longer be a way to have those resources restored for the American public.

We similarly think that the allocation system, which doesn't even have the government as protector of the funds sitting at the allocation table, will be designed to significantly increase the costs that the Fund has to pay in these cleanups rather than the polluter has to pay, to the detriment of the American public.

Thank you. I would be pleased to answer questions.

[The prepared statement of Lois J. Schiffer follows:]

PREPARED STATEMENT OF LOIS J. SCHIFFER, ASSISTANT ATTORNEY GENERAL, ENVIRONMENT & Natural Resources Division, U.S. Department of Justice

Good morning, Mr. Chairman and members of the Subcommittee. Thank you for the opportunity to present the views of the Department of Justice on H.R. 2500, the "Reform of Superfund Act" of 1995, as introduced on October 18, 1995. This bill would amend the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), the Federal statute designed to clean up the nation's worst hazardous waste sites.

As the Assistant Attorney General for the Environment and Natural Resources Division, I am responsible for enforcing this country's federal environmental laws, including the Superfund law, together with EPA. In addition, I have had extensive experience in Superfund litigation, both on behalf of the government and in the private sector. In this testimony, I will address the aspects of H.R. 2500 that affect Superfund liability, litigation and judicial review.

INTRODUCTION

This Administration has worked very hard for the responsible reform of Superfund, to make it faster, fairer, and more efficient. The Administration proposed a bill to accomplish this goal in last year's Congress, and received wide support from a broad coalition of industry, environmental groups, small business representatives, and other groups for a responsible reform proposal that was set forth in H.R. 4916. That reform proposal was re-introduced by Mr. Dingell this year as H.R. 228. We continue to support "responsible reform" of Superfund, as proposed by these bills.

H.R. 2500 is not a responsible proposal for reform of Superfund. Although the bill addresses each of the key issues involved in Superfund reform, and proposes some innovative new ideas such as liability exemptions for municipal landfill sites and de-minimis parties, it is fundamentally flawed.

Instead of making Superfund "faster, fairer and more efficient," H.R. 2500 will devastate our ability to carry out the basic purpose of this statute that the public supports—to get hazardous waste sites cleaned up quickly, sensible, and cost-effectively. It will severely hamper our ability to get potentially responsible parties ("PRPs") to conduct site cleanups, and slow down cleanups dramatically at a point in time when substantial cleanup progress is finally being made. Further, this bill creates a wealth of new opportunities for litigation, contrary to our common goal of reducing Superfund litigation and transaction costs for all parties.

Finally, there does not appear to be adequate funding for the reforms proposed by the bill. EPA estimates that this bill would cost it more than $1 billion per year to implement, in addition to the current program.

In this testimony, I will concentrate on the following seven provisions of H.R. 2500 regarding liability:

(1) The 50% rebate for PRPs whose liability is based on pre-1987 activity;
(2) The liability exemptions for municipal landfills and *de minimis* parties;
(3) The allocation system;
(4) Restrictions on enforcement authority, as they relate to the government's ability to get PRPs to clean up sites;
(5) The effect of the provisions for reopening existing remedy Records of Decision (RODs), and lifting the bar of Section 113(h) of CERCLA on "pre-enforcement" judicial review of remedy decisions;
(6) Natural resource damages; and
(7) State delegation provisions.

In addition, at the end of the testimony I address briefly a few other issues raised by H.R. 2500. This testimony does not, however, include an exhaustive list of the many concerns that I have with this bill. The bill has a great number of serious technical deficiencies that make it somewhat difficult to understand and apply. Each of these issues raises the specter of new litigation.

(1) *The 50% Rebate for Parties with Pre-1987 Liability*—One of the primary features of H.R. 2500 is the so-called "Retroactive Liability Discount," which would give responsible parties whose liability is based on activities that occurred before 1987 a rebate from the Superfund of 50% of the response costs they incur after October 18, 1985. The Administration strongly objects to this proposal on principle—it will transform the Superfund program from a program to clean up contamination to a program to pay polluters.

This provision is unfair, unaffordable, and unworkable. It is unfair to the public to allow parties who dumped hazardous substances into the environment up to 7 years after the Superfund law was enacted to obtain a 50% rebate from the taxpayers for the cost of cleaning up their own mess. It is entirely erroneous to label this provision a "retroactive liability discount." Superfund has been in effect since 1980. There is nothing at all "retroactive" about liability for acts that occurred after 1980. Moreover, prior to 1980 there was legal liability for cleaning up hazardous wastes dumped into the environment, under the Resource Conservation and Recovery Act (1976) as well as under earlier statutes and common law.

The 50% rebate is also unfair to the responsible companies who have already spent millions cleaning up their hazardous waste sites, by providing reimbursement only for those who have not yet cleaned up their sites. Further, it will reward parties who have been recalcitrant in complying with the law. As the Justice Department official responsible for enforcement of the nation's environmental laws, I believe this sends a very irresponsible public message.

The rebate provision is unaffordable. The 50% rebate provision is unaffordable under the current Superfund budget and will have a devastating impact on the cleanup program. EPA estimates that this provision, in combination with the liability exemptions proposed by H.R. 2500, would cost more than $1 billion in excess of its current annual Superfund budget.

These huge expenditures will not buy one more ounce of protection for public health or the environment. Moreover, they are likely to have a severe impact on slowing down cleanups, which must be funded from the same, limited source of funds. The provision requiring that rebates, as well as reimbursements for municipal landfill cleanups (discussed below) must be paid "upon receipt of application" is particularly troubling. This appears to give priority to rebates and reimbursement over funding cleanups needed to protect human health and the environment.

The rebate provision is unworkable. The rebate provision will require the creation of a whole new bureaucracy to process claims, and lead to considerable litigation. For each of the thousands of reimbursement claims that are likely to come in, EPA will have to determine whether the party qualifies for reimbursement under the terms of the statute, when the response costs were incurred, whether the response costs were incurred consistent with the National Contingency Plan, and whether

there is adequate documentation of the amount of the costs. Inevitably, there will be disputes over these issues, creating a significant new source of litigation and transaction costs.

Examples. Some examples of how the rebate provision of this bill creates an *entitlement* to Government handouts for polluters who jeopardized the public's health and safety and the environment will illustrate the injustice of this proposal.

Bunker Hill, Idaho. Some 6,000 people *live* within the 21-square mile radius of the Bunker Hill Superfund site in Idaho. After more than 100 years of mining, ore processing, and smelting operations conducted primarily by six mining companies, the soil and groundwater at the site was heavily contaminated with lead and other heavy metals—for example, on one plot, soil lead levels exceeded 1,000 parts per million. These mining companies have now agreed to clean up the contamination of approximately 1,350 residential backyards, with priority given to yards frequented by children and pregnant women. The cleanup will cost these companies approximately $40 million, but they will be entitled to up to $20 million back from the Government under this bill.

Lipari Landfill, New Jersey. The Lipari Landfill in Pitman, new Jersey, is the No. 1 site on the National Priorities List. Industrial wastes dumped at this site contaminated groundwater and surface waters, including a recreational lake, Alcyon Lake. Rohm and Haas, one of the major PRPs at the site, performed one part of the remedial action, and EPA is continuing to perform another part of the remedy to clean up on-site contaminants and prevent more contamination from spreading from the site. Total estimated cleanup costs are approximately $120 million.

Under a consent decree with the United States, Rohm and Haas agreed to reimburse EPA periodically for its costs of implementing the continuing remedial action, up to a total of $42 million. Approximately $25-$30 million of this remains to be spent. If the 50% rebate proposal becomes law, the taxpayers will have to pay for half of this ($12-$15 million) despite Rohm & Haas' agreement under the consent decree to pay the full amount.

Ormet site, Ohio. From 1958 to 1981, the Ormet Aluminum Corporation disposed of approximately 85,000 tons of cyanide-containing wastes in open, unlined pits and disposal ponds on its site in Monroe County, Ohio. The site was placed on the National Priorities List in 1985. EPA initially proposed a remedy of $28 million based on an expectation of future residential land use, but revised the plan in response to public comment expressing concerns about economic impact. The final remedy, which is based on an industrial land use scenario and will include deed restrictions to prevent future installation of drinking water wells or residential construction, is expected to cost $8 million.

There is no question that Ormet is responsible for the contamination on this site, and the company has agreed to perform the remedy under a consent decree with the United States. Yet, under the 50% rebate proposal, the taxpayers will have to send Ormet back a check for $4 million. If Ormet had cleaned up its site years ago, it would not have qualified for this rebate.

The question is, do we really want to write these checks? There is no question about these companies' responsibility; they owned the site, they generated the waste. And now they've stepped up to do the work. I applaud their willingness to do the work, but should the taxpayers be responsible for paying half the cost? How many fewer cleanups will there be at other Superfund sites because of the money we will spend to clean up a few at a discount to the companies that polluted?

(2) *The Proposed Liability Exemptions*—H.R. 2500 proposes new exemptions from Superfund liability for, among others, two major groups of private responsible parties: (1) all responsible parties at "municipal landfills," and (2) generators and transporters of "de minimis" amounts of waste prior to 1987. The bill also includes several other exemptions or limitations on liability, which are not discussed herein.

We agree that the issues of liability for municipal landfills and liability of small contributors should be addressed in any Superfund reform proposal. Unfortunately, the proposed exemptions from liability proposed by H.R. 2500 appear to be unaffordable. Moreover, as crafted in H.R. 2500, these exemptions have significant implementation problems. The de minimis exemption in particular is not likely to effectively accomplish its goals of removing small contributors from the Superfund system early.

"Municipal landfill carve-out." H.R. 2500 would exempt all parties, except federal PRPs, at non-federally owned "municipal landfill" sites that were on the National Priorities List as of June 15, 1995.[1] Responsible parties currently performing clean-

[1] The significance of that date is unclear; it has no basis in law that I am aware of.

ups of these sites are required to complete the cleanups, but they will be reimbursed from the Superfund for all response costs incurred after October 18, 1995.

Several key provisions of the H.R. 2500 "municipal landfill carve-out" are unclear, including the scope of application of the provision, *i.e.* the number of sites which would be included, and the effective date of the exemption. These significant technical problems would make it extremely difficult to implement this provision efficiently, even if funds were available. Moreover, these problems inevitably will lead to a significant amount of litigation over this proposed liability exemption.

The transition provision which requires parties now conducting cleanups of municipal landfills to continue that performance is a good idea. However, H.R. 2500 appears to provide for reimbursement of these parties for past, as well as future, costs of cleanup. In addition to having huge cost implications, this provision raises significant fairness concerns. No comparable reimbursement of past costs is provided for parties whose cleanups of municipal landfills is complete. The message that this disparity of treatment sends is that those who clean up later will be rewarded, and those who cleaned up early will be disadvantaged. That is not a fair or responsible message. Finally, we must recognize that the reimbursement provision for municipal landfill cleanups, like any reimbursement provision, is likely to lead to a significant amount of litigation.

Exclusion of federal agencies from exemptions. We note that H.R. 2500 excludes federal agencies from qualification for the municipal landfill exemption, as well as other statutory exemptions the bill would create. We agree that federal agencies who have contributed to hazardous waste sites should have to fulfill the same responsibilities to the American public as any other PRP. However, we would like to point out that excepting federal agencies from the municipal landfill exemption could leave the federal government as the only liable party at many of these sites, potentially imposing the entire burden of cleaning up these sites on a federal agency, while major industrial PRPs walk away.

The proposed "de minimis" exemption will not provide adequate relief to small contributors. H.R. 2500 would exempt from liability all "generators" and "transporters" of less than 1% of the total volume of wastes at sites on the National Priorities List, if all their activities ceased before 1987. This provision is unlikely to work effectively to get "de minimis" parties out of the Superfund liability system early and with certainty.

In order to determine whether a party contributed more or less than 1% of the total volume of wastes to a site, it is necessary to determine both the amount of that party's waste contribution and the total volume of wastes at the site. At most Superfund sites, reliable information about the total volume of wastes is not available. Typically, this figure must be inferred from other information, such as contributions by individual parties, testimony of site workers or transporters, and physical evidence at the site. These sources of information are usually incomplete as well, and the total volume that can be derived is at best a rough estimate.

Rough volume estimates have been sufficient for determining the identity of "de minimis" parties for purposes of settlements with the government. Under current law and practice, the government is afforded a substantial amount of discretion in making this determination for settlement purposes. Because of this, the Department of Justice has been very successful in defending a large number of de minimis settlements against attacks by major responsible parties who have argued that some of the de minimis settlers don't qualify for the de minimis cutoff.

Using a percentage determination as the basis for a statutory exemption from liability is quite a different matter. If major responsible parties do not agree that a party qualifies for the de minimis exemption, as is often the case, the de minimis party will be unable to avoid being dragged into litigation. Without a settlement with the government (and the government does not, of course, settle with exempt parties), the de minimis party will have no contribution protection.

Under the scheme devised by H.R. 2500, the third-party neutral allocator may be able to keep the de minimis party from being dragged into the allocation process, but will not be able to provide them with effective protection from suit once the allocation is over.

This is not responsible relief for the small contributors. They need certainty, predictability, and early resolution of their liability. Under H.R. 2500, they will receive just the opposite—more uncertainty for a longer time. Moreover, they will lose the

one sure mechanism that they now have to get out of the liability net—*de minimis* settlements with the government.[2]

The Proposed "Illegality" Exception to the Exemptions is Unworkable. H.R. 2500 purports to make an exception, from the liability exemptions and the pre-1987 liability rebate, for responsible parties whose liability arose from activities that were "illegal" at the time they were undertaken. This provision does not work for two reasons.

First, the provision is drafted to have an exceedingly narrow application. It is limited to parties whose liability is determined by a court to be "illegal" prior to the expiration of the applicable statute of limitations. Even parties whose acts were criminal could still qualify for liability exemptions and reimbursements, if they were not prosecuted before the statute of limitations expired. Most of these statutes of limitation are likely to have expired long ago. This provision is not likely to preserve any significant amount of PRP funding for cleanups.

Second, injection of this issue into the Superfund liability scheme will slow down the allocation process and lead to litigation. It could have the perverse effect of pressuring the government to file more cases, where a statute of limitations bar is about to expire—fomenting litigation when one of the prime purposes of the bill is supposed to be to reduce litigation.

In sum, this exception is a fairly empty gesture that is simply not worth making.

(3) *The Proposed Allocation System*—The Administration supports the use of a third-party neutral allocation system to replace contribution litigation as the method of apportioning response costs among responsible parties. Such a system would utilize the services of an experienced private party, hired under contract by EPA, to review the information available about a site and to come up with a recommendation for the allocation of shares of responsibility among the parties responsible for creating the site. Because there is incomplete information about site history and waste contributions at most Superfund sites (complete documentation is usually lacking and parties' memories are sketchy), the allocation necessarily will be based on rough approximations of equitable shares in most cases.

By having a neutral third party, rather than a court, perform an allocation of responsibility on an informal basis, instead of through judicial procedures that are often time-consuming and expensive, we should be able to reduce transaction costs for determining shares of responsibility significantly. This allocation can then provide the basis for settlement with the government, obviating the need for contribution litigation. This is responsible reform.

Unfortunately, H.R. 2500 makes significant changes in the allocation system that was proposed and supported by the Administration last year. We proposed an allocation system under which the allocator would function more like a mediator. In my experience, mediation is an excellent method for resolving disputes and avoiding litigation.

In contrast, H.R. 2500 turns the allocation system essentially into a judicial process, resulting in a decision by the mediator that is effectively binding on the government. The government is permitted to reject an allocation result only for extremely limited reasons. This type of allocation system is not likely to be anywhere near as effective as the mediation-type system in lowering transaction costs.

Moreover, there is very little protection for small or non-liable parties built into the system proposed by H.R. 2500. The allocator, a private party selected by the PRPs identified by EPA, makes all the "gatekeeper" choices of which parties will be pulled into the system and which will not. The government has no power to keep non-liable parties out. Moreover, there are short deadlines for PRPs to nominate additional PRPs. In our experience in "pilot allocations," we have found that these short deadlines will tend to push major PRPs to pick up the "phone book" and nominate many small parties when in doubt. This is neither efficient nor fair to the small parties.

In addition to the lack of a "fairness" check on the allocation system proposed by H.R. 2500, the process is made extremely inflexible by a myriad of detailed procedural provisions and deadlines, and a prohibition against EPA's issuing any regulations governing the system that would affect the discretion of the allocator. This will leave the government, as well as the PRPs, powerless to deal with unanticipated

[2] Inexplicably, H.R. 2500 leaves in the existing statutory provisions for de minimis settlements, and adds provisions from last year's bill. H.R. 4916, parties who have a share of 1% or less will be presumed to be "de minimis" unless their wastes have a significantly higher toxicity or the Administrator determines that a level other 1% should be used at a particular site. These provisions conflict with the de minimis exemption from liability, and will cause a great deal of confusion and litigation.

problems sensibly and flexibly as they arise—for example, the problem of major PRPs "picking up the telephone book" when faced with a deadline they can't meet.

This statutory rigidity simply does not make good sense when dealing with an entirely new, untried process. EPA should be given the flexibility to craft, and modify, the allocation process by rule. If a check is desired on EPA, Congress could be given an opportunity to overturn the regulations within a certain period of time. PRPs would also have the opportunity to challenge any regulations they object to in court.

The scope and number of allocations that EPA would be required to conduct is far broader in H.R. 2500 than in H.R. 228. H.R. 2500 would require allocations for removals, as well as remedial actions, and would allow a wide range of parties to insist on allocations for response actions selected prior to enactment of this statute, as long as any work is ongoing at the site and the party who makes the demand has incurred any response costs. This could require so many allocations that EPA's resources will be swamped just dealing with the demands for allocations. In contrast, H.R. 228 takes a more restrained approach—mandating allocations only for sites at which remedies are selected after the date of enactment of PRPRs currently performing the remedy ask for allocation, and authorizing EPA to conduct allocations for any other situation where it makes sense.

H.R. 2500 is not clear as to what happens at the end of the allocation process—as to where or not PRPs can be required to perform the remedy, and whether or not PRPs can be required to perform the remedy, and whether parties who refuse to settle or perform the remedy are subject to joint and several liability.

H.R. 2500 is also not clear as to the critical issue of whether and to what extent the Superfund is required to provide "orphan share funding." The provision of earlier drafts of the bill for Fund payment of the orphan share of defunct companies has been eliminated. Yet, the allocator is not required to allocate 100% of the responsibility for the site among the parties to the allocation, leaving open the possibility that an "orphan share" will be created indirectly if the allocator decides to allocation less than 100% of responsibility to the PRPs who participate in the process.

The bill purports to create a "Fund reimbursable share" for the exempted municipal landfills, de minimis parties, and all other parties that are exempted from liability, as well as for the parties who are entitled to the 50% rebate for pre-1987 liability. However, the drafting of this provision is so unclear that it is virtually impossible to tell what, if any, amounts would be included within it.

To the extent that the Fund is required to pay the orphan share or the "Fund reimbursable shares," in effect the taxpayers are forced to pay for the liability rebates and exemptions provided by H.R. 2500, and less money will be available for site cleanups. If the Fund is not required to pay these amounts, it is difficult to understand where the money will come from to pay for the rebates and exemptions.

Despite the large amount of government funds that are potentially at issue in the allocation process, the provisions authorizing the government to participate in the allocation process were deleted in the final version of H.R. 2500. If the Fund share is unrepresented, there is a much higher likelihood that a greater proportion of responsibility will be assigned to it during the allocation process. Moreover, the government is required to give great deference to the allocator's decision and is subject to judicial review if it rejects a poor allocation a second time. These provisions, taken together, will effectively prevent the government from protecting the Fund from being depleted by poor allocation decisions—and protecting the public from the consequences of fewer, slower cleanups.

Another significant problem with the allocation system in H.R. 2500 is its lack of clarity about whether parties must go through the allocation process in order to qualify for the 50% rebate for pre-1987 liability. If not, this issue is likely to be litigated in the courts. This issue is particularly unclear with respect to single owner sites. The bill entitles them to receive the 50% rebate for pre-1987 liability, but excludes them from the mandatory allocation provisions.

In sum, the allocation provision of H.R. 2500 is rife with new opportunities for litigation.

(4) *H.R. 2500 Severely Curtails the Government's Ability to Compel Responsible Parties to Clean Up Superfund Sites*—Under H.R. 2500 EPA's and the Department of Justice's ability to compel responsible parties to clean up Superfund sites is severely curtailed by numerous restrictions on the use of unilateral administrative orders ("UAOs"), the "entitlement" of PRPs to "cashout" settlements, and lack of clarity about whether the legal principle of joint and several liability will continue to apply.

As I have testified previously, the principle of joint and several liability is absolutely essential to the government's ability to get responsible parties to clean up hazardous waste sites and to settle, rather than litigate, with the government. By creating an allocation system without expressly retaining the principle of joint and

several liability as the background rule for liability, this bill will undermine significantly our ability to reach settlements and get hazardous waste sites cleaned up voluntarily.

The bill's numerous restrictions on EPA's ability to issue unilateral administrative orders begin with a ban on the issuance of orders until 90 days after the allocation is complete.[3] Moreover, after the allocation process is completed, the bill provides that responsible parties are "entitled" to a cash settlement with the government for the amount of their allocated share. This provision completely undercuts the government's ability to compel or convince responsible parties to clean up a site. If parties can get a cash settlement for a limited percentage of the site cleanup, they are far more likely to take that choice instead of undertaking the entire cleanup.

These provisions have the potential to result in far fewer PRPs performing cleanups, and to turn Superfund into a public works program. That would dramatically increase the cost of the program to the government. It would also increase the total cost of cleanup to society, because the well-known efficiency factor of private cleanups would be lost.

A further surprising restriction on EPA's administrative order authority is the bill's prohibition against administrative orders at non-NPL sites for any response actions that exceed a cumulative $3 million or 2-year limit. The justification for the cutback of removal authority at non-NPL sites is extremely puzzling, in light of the widespread recognition that EPA's removal program works very well.

(5) *The Provisions for Reopening RODs and Allowing Judicial Review of Remedies Will Slow Down Cleanups*—The Department of Justice shares EPA's concerns that the remedy provisions of Title IV will not provide sufficient protection for human health and environment. In addition, we share EPA's concerns that the elaborate risk assessment procedures and the provisions for reopening hundreds of completed Records of Decision will have a devastating effect on slowing down ongoing cleanups.

I am particularly concerned that significant delays in cleanups would be caused by the provision that destroys the current "pre-enforcement review bar" of Section 113(h) of CERCLA. This opens the door to private parties to go to court to stop cleanups that are now underway. The result could be severe delays in cleanup while the issue of what remedy is appropriate is rovisited and litigated. Once the door is opened to this kind of litigation the delays in remedies could be widespread and could go on for years.

(6) *H.R. 2500 Would Result in the Depletion and Deterioration of America's Natural Resources*—Title IV of H.R. 2500 will prevent effective implementation of the Superfund natural resource damages program. As NOAA Assistant Secretary Doug Hall more fully describes, injury to our nation's natural resources from hazardous waste disposal is still a serious and persistent problem. Rather than ensuring that the public regains these resources, however, H.R. 2500's NRD provisions are a significant step backward. H.R. 2500 also includes numerous new procedural hurdles that will convert this restoration program into a litigation program.

H.R. 2500 Sacrifices Natural Resources. Because the Superfund does not cover NRD assessment or restoration, federal, state, and tribal natural resource trustees rely on Superfund's liability provisions to obtain natural resource restoration. A number of H.R. 2500's provisions, however, cut major holes in the liability framework, precluding effective restoration in some cases and full restoration in others, and leaving the public with significant resource loss. Among the most significant are a statutory limit on liability, a significant reduction in U.S. trust jurisdiction, and an overbroad "double recovery" provision. These provisions will effectively convert this program from one of settlement to litigation, while at the same time limiting the ability of trustees to assure that the nation's natural resources are available for future generations.

Limitation on Liability. First, H.R. 2500's "aggregate liability cap" restricts restoration to $50 million per contaminated "area." The new limitation significantly broadens current law, which limits liability at $50 million per "incident involving release." The practical impact of this will be to preclude complete natural resource restoration in the sites of most serious injury across the nation, with devastating consequences both for the resources and for nearby communities. Liability is limited no matter how many parties are responsible for or how many acts of disposal resulted in the harm. The cap would effectively preclude restoration of areas like the Los Angeles Harbor area, off the California coast. There, companies pumped DDT and PCBs into the harbor area through sewer pipes, as well as dumping them off

[3] Additional significant restrictions on EPA's administrative order authority include provisions that effectively prevent the use of sequential orders to guide cleanup and that hamper effective enforcement of administrative orders.

barges. DDTs and PCBs affect more than 15 square miles of the sea floor, impacting bald eagle and peregrine falcon reproduction and forcing the State to impose fishery closures and issue health advisories.

Even when a company injures resources in a way that is grossly negligent, willfully negligent, or reckless, H.R. 2500 caps liability at $50 million per contaminated "area." (The liability cap is lifted only for willful misconduct.) If the Clean Water Act contained these provisions, Exxon's liability of hundreds of millions of dollars to address the Exxon Valdez spill, which devastated Prince William Sound in Alaska, would have been restricted to just $50 million.

Elimination of Federal Trust Jurisdiction. Second, H.R. 2500 substantially reduces United States trust jurisdiction from current coverage of resources "belonging to," "managed by," or "controlled by" the United States to just those resources "owned or held in trust." Under present law, federal trustees—particularly NOAA and the Department of the Interior ("DOI")—manage important public resources like the coasts, marine sanctuaries, anadromous fish, migratory birds, and endangered species throughout their range. *See* CERCLA Sections 101(16), 107(f); National contingency Plan, 40 C.F.R. § 300.600

Rather than "clarifying" federal trustee authority, H.R. 2500 simply cuts it back. U.S. trustees, particularly NOA and DOI's Fish & Wildlife Service, will no longer be able to address serious natural resource harm to currently covered resources. H.R. 2500 removes federal authority to address harm to wildlife that crosses state lines—such as wood ducks, other migratory birds, and salmon. While a state might seek damages for the local effects of injury to such resources, eliminating federal trusteeship might mean that no trustee could address the interstate effects of contamination. Some resources will no longer be coverod at all. Coastal areas beyond three miles out from shore are *exclusively* under federal management authority; neither states nor tribes can address injuries to natural resources in those areas. If these provisions were in the Clean Water Act, the United States could not have addressed the extensive natural resource loss arising from the Exxon Valdez spill—and the State of Alaska would have had no authority to address harm more than 3 miles from the coastline.

H.R. 2500's reduction in federal trust jurisdiction will seriously undermine damage assessments and restorations that are presently underway. State, federal and tribal natural resource trustees have a record of cooperative interactions. Federal trustees often serve as lead trustees, coordinating federal, state, and tribal assessment and restoration efforts. For example, NOAA is serving this role at Commencement Bay, Washington, an NPL site, where industrial facilities have extensively injured marine resources such as salmon, shellfish, and birds. NOAA serves as lead trustee, coordinating the efforts of *six other* trustee representatives—including two Indian tribes and three agencies of the State of Washington. Assessment is proceeding rapidly, and three agreements have been reached with responsible parties to address resource harm—with *no active litigation.* H.R. 2500 will prevent this successful coordination at this and other sites across the nation.

Overbroad Double Recovery Provision. The so-called "double recovery" provision also adversely affects natural resource restoration. This new provision effectively prohibits trustees from bringing NRD claims where there has already been some recovery at a site for "natural resource injury." By doing so, this provision permits defendants to gain immunity by settling with any trustee for any aspect of NRD at a particular site.

No rationale has been presented for this provision. Present law already precludes any double recovery of natural resource damages for the "same release and natural resource." Rather than "clarifying," H.R. 2500's new provision would bar an NRD claim if *any* claim has been brought arguably relating to a generalized "natural resource injury." As a practical matter, H.R. 2500 could be read to permit *only one claim* to be brought for any area that has been injured. If these provisions were in the Clean Water Act and commercial fishermen recovered first for business losses from the Exxon Valdez spill, the United States and Alaska might have been prevented from acting on the public's behalf to address natural resource harm at Prince William Sound.

Moreover, an earlier recovery might also bar a trustee's NRD claim even if the earlier recovery is wholly inadequate to address the natural resource harm; if it addresses a different natural resource; or if the recovery is not being used for restoration. For example, effective restoration would be precluded at Bunker Hill/Coeur d'Alene, Idaho, where leaching mining wastes have poisoned an entire watershed. Early on, the State of Idaho settled its claim at the site for a very small amount—less than 2% of the amount likely needed for restoration. Since the State's settlement, lead, zinc, and cadmium from mining waste have continued to poison tundra swans and to eliminate fish from longer river segments. H.R. 2500, however, could

bar the claims of the United States and the Coeur d'Alene Tribe, precluding effective restoration.

The "double recovery" provision will also greatly increase litigation. A trustee may be compelled to file sooner than normal to ensure that its claim is not barred by the action of other litigants. Consequently, instead of being able to assess the injury and reach a negotiated settlement with responsible parties, state, federal, and tribal trustees will all have to "race to the courthouse" and get their recovery awarded first. Instead of litigating only a few cases, as at present, H.R. 2500 will compel trustees to litigate *most cases.*

New Procedural Requirements Will Generate Litigation. In addition to the "double recovery" provision, H.R. 2500 contains a host of prescriptive, detailed requirements for assessment and restoration that will divert private and public resources from restoration to litigation.

At present, trustees accomplish restoration under Superfund with minimal litigation. To date, we have actively litigated only a handful of NRD claims. The vast majority of federal natural resource damages claims are resolved through good cooperation—and without active litigation. As GAO has documented as of April, 1995, federal agencies had settled 98 NRD claims under Superfund for an estimated total of $106 million. In nearly half these cases, liability was resolved without separate payment to the trustees; in most other cases, the damages settlement was small.

By creating an array of highly detailed requirements for assessment and restoration that can *all* be litigated, H.R. 2500 would reverse this pattern of cooperative settlements. Restoration will be tied up and trustees compelled to litigate.

For example, H.R. 2500 requires the trustees to conduct elaborate "cost-reasonableness" analyses when they evaluate restoration alternatives and select restoration options. In addition to showing that restoration costs do not exceed the "value of services" provided by a particular restoration alternative, trustees are also compelled to analyze whether the *incremental* costs of a particular restoration alternative are outweighed by its *incremental* benefits.

H.R. 2500 also creates a new standard for scientific evidence. Assessments must conform not only to duly promulgated regulations, but to "generally accepted scientific and technical standards and methods." This new threshold rule for scientific and technical data departs from well-settled standards established by Federal Rule of Evidence 702. H.R. 2500 also limits natural resource damage claims to those resources that are "ecologically significant," which could be read to prevent trustees from addressing the cumulative effects of multiple small resource injuries. These requirements appear designed to limit NRD restoration.

We know from our experience at the Justice Department that PRPs seeking to delay restoration will take full advantage of the innumerable new opportunities created by H.R. 2500. Lawyers for PRPs will be able to use these new provisions to hinder and delay important natural resource restoration actions. Together with the limitations on recovery, H.R. 2500's new procedural provisions will convert the natural resource damages program from a program of restoration to a litigation program.

(7) *State Delegation Provisions*—H.R. 2500 takes a wholly unprocedented approach to state participation under CERCLA that we believe is likely to lead to Constitutional challenges, if not infirmity. H.R. 2500 mandates the delegation of the Administrator's executive authority to the states and precludes the President from administering those authorities. To our knowledge there is no environmental or any other federal procedent for stripping the President of his administrative and judicial authority to implement federal law, and we have grave concerns over the propriety of doing so here.

We also share EPA's concern that the time allowed for EPA review, and the information made available upon which to base review, of a state request for delegation is simply insufficient to inform a reasoned decision process.

OTHER PROVISIONS OF INTEREST

"Brownfields" Reform: Protection for Lenders, Fiduciaries and Prospective Purchasers. We support responsible reform to address the concerns of lenders and the so-called "brownfields" impediments to economic redevelopment of Superfund sites that have resulted from the liability provisions of CERCLA. However, there are certain aspects of the methods chosen to address these concerns in H.R. 2500 that are problematic.

For example, the "lender liability" provisions include a cap on lender liability that is unclear and is likely to cause litigation, as well as creating unfair results. The cap would limit a lender's total liability to the "actual benefit" it receives from a cleanup, even where a lender has actually become the operator of a facility. If the

"actual benefit" were interpreted to mean the outstanding amount of the lender's loan, a lender with a paid-down loan could undertake operations with impunity.[4]

The bill does not exempt from liability Federal lenders who "involuntarily" acquire contaminated property, as it does for private lenders.

The fiduciary liability section contains inadequate protections against sham fiduciary relationships. Moreover, as drafted, H.R. 2500 may have the unintended effect of exempting trusts from liability altogether—even when a trust owns or operates a waste disposal facility. That is an invitation to facility operators to set up sham trusts.

Third, H.R. 2500's "innocent landowner" liability exemption, which enables prospective purchasers to buy Superfund sites for redevelopment without fear of incurring liability, fails to require the purchasers to cooperate with cleanup of the property. This is inconsistent with the purpose of the provision to encourage the cleanup, as well as redevelopment, of brownfields sites.

H.R. 2500 Creates Dozens of New Opportunities for Litigation. H.R. 2500 creates dozens of new opportunities for litigation, by injecting new issues into Superfund liability, requiring new procedures for remedy selection, and failing to draft a host of new provisions with the clarity that is necessary to avoid litigation. Some examples include:

Litigation about whether PRPs liability is based on acts that occurred before or after 1987.

Reimbursement litigation.

Litigation about which sites qualify for the "municipal landfill" exemption.

Litigation about which parties qualify for the *de minimis* exemption.

Litigation about whether exemptions are voided by the "illegality" exception.

Litigation over what defenses to liability are permitted.

Litigation about whether joint and several liability applies when the allocation system is in effect.

Litigation over EPA regulations for risk assessments, reimbursement, remediation waste and other issues.

Litigation reviewing EPA state delegation decisions.

Litigation challenging past and present records of decision choosing remedies.

Litigation concerning what existing EPA and state orders, permits, or agreements, are deemed "Remediation Action Plans" under RCRA.

Litigation challenging Remediation Action Plans, and where remediation wastes are transferred from one state to another, litigation concerning to what extent that laws of the receiving state apply.

Litigation over many new issues for natural resource damage claims, including:

—whether natural resource trustees correctly "valued" public services provided by a particular restoration alternative;

—whether trustees included (or failed to include) certain types of services in performing this valuation;

—whether trustees correctly evaluated "incremental" costs and benefits from a restoration alternative, compared with another alternative;

—whether trustees selected the correct "increment;"

—whether the scientific evidence that natural resource trustees use, that is otherwise admissible into evidence under Evidence Rule 702, is "generally accepted;" and

—whether injured natural resorces are "ecologically significant."

These are only a few examples of the new litigation that will result from new issues that the bill inserts into the statute or lack of clarity in drafting. The many litigation opportunities that will result from lack of clarity, or other technical errors in drafting, could be avoided if there were a serious opportunity for careful bipartisan discussions and Administration review of this bill. The lack of opportunity for such discussion, or any serious discussion with the Administration of the major provisions of this bill to date, is certain to lead to difficulties in implementation and, unavoidably, litigation.

[4] There is an exception to the cap for lenders who "cause or contribute to" contamination at the site. This is a much higher standard of proof than is required for any other site operator. Creating such a double standard is unfair and unwise.

CONCLUSION

H.R. 2500 incorporates many good ideas for Superfund reform that have been proposed in previous bills, as well as some new ideas. However, this bill as presently conceived and drafted will prevent the Superfund program from accomplishing its basic goal of cleaning up Superfund sites. Instead, resources will be substantially diverted to pay for rebates and exemptions for responsible parties, and the federal government will be unable effectively to enforce the provisions of the law that require the parties who were responsible for creating hazardous wastes to clean them up.

In sum, this bill simply does not provide for "responsible reform" of Superfund. It is so fundamentally flawed that it does not even provide a good starting point for responsible reform.

Mr. OXLEY. Thank you, Ms. Schiffer.

Ms. Goodman.

STATEMENT OF SHERRI W. GOODMAN

Ms. GOODMAN. Thank you, Mr. Chairman, and thank you for the opportunity to testify today. I will summarize my written statement for you.

The Department of Defense has one of the most diverse environmental programs in the Nation. In fact, the Department of Defense is America's largest industrial organization, with over 400 industrial plants across the country. We are also one of the Nation's largest land managers as steward for 25 million acres of land, including a broad diversity of ecosystems.

We also have over 14,000 contaminated sites in all 50 States, and 107 military bases are on the Superfund National Priorities List.

The Department of Defense is committed to protecting the health and safety of its people and to protecting vulnerable communities around our installations. DOD believes environmental security is a critical component of the national defense mission. An integral part of the defense mission includes compliance with environmental laws and regulations. As the number of laws has grown over recent years, our installation commanders have embraced this challenge.

For them the most sweeping of these laws is indeed Superfund. The Department of Defense will benefit from responsible reform of the Superfund law. Unfortunately, Mr. Chairman, we think that some of the reforms in this bill would in the end lead to not as efficient a program as we believe is needed and would not be in all cases sufficiently adequate to meet the Department's responsibility to protect human health and the environment at our facilities.

Further, the proposed bill would increase the cost of Federal facility cleanup by creating unmanageable roles for State and Federal regulators. In fact, in important ways this bill continues to treat Federal facilities different from private sites, a principle that we believe should no longer apply to Federal facilities.

Our goal is to achieve cleanups that are protective of human health and the environment, are cost-effective use of taxpayer dollars, and return property to local users as quickly as possible without abdicating our responsibility to clean up those properties.

The Department of Defense believes that reform must take into consideration three basic principles.

First, that the polluter should pay for past disposal practices even when it is a Federal agency on behalf of the American public. At our third-party sites, Federal agencies would still retain the sole

responsibility. So this could, under the liability scheme proposed in H.R. 2500, saddle Federal agencies and, therefore, the American taxpayer with disproportionate liability at those particular sites.

Second, we want to see faster and more cost-effective cleanups. That is important. While there are a lot of good contributions that are made in that regard, in this area the proposed risk analysis improves the existing system, but we do believe that hot spots need to be treated.

Third, and quite importantly, economic redevelopment, particularly at our closing military bases, is key. The proposed bill would still encourage development more in greenfield areas of military bases than in the industrial areas. We want to remove these impediments to economic redevelopment. The bill does not include a provision for early transfer of property at closing bases, allowing such property to be put to productive economic use and treating Federal facilities the same way that private sites are treated today.

The Department of Defense supports remedy reforms that will use standardized risk analysis, that use realistic risk assumptions and incorporate future land use into the exposure assessment. We support the establishment of national cleanup goals to gain consistency in remedy selections while recognizing that cleanup levels for some contaminants will need to be established through rulemaking.

We believe reforms that include reasonably foreseeable future land use as a consideration involving all necessary stakeholders as a consideration in remedy selection are important.

We do believe that we should eliminate the mandatory preference for permanent remedies that treat wastes except for the worst hot spots, and that's where we believe that H.R. 2500 does not sufficiently meet that challenge.

We do think it's appropriate to elevate the role of cost when considering other factors in remedy selection, but we are not sure that the tests in H.R. 2500 would be sufficiently simple and not too confusing, and that is a concern to us.

We do want to encourage the use of innovative technologies and generic remedies, and we do believe it's important to increase the role of citizen participation. We have established citizen advisory boards which we call Restoration Advisory Boards (RAB's) at all of our military bases, including Wright-Patterson AFB, which is adjacent to your district, Mr. Chairman. We would like to see those Restoration Advisory Boards recognized and indeed grandfathered in the Superfund reform bill.

To conclude, Mr. Chairman, we want to work together in a bipartisan process. We will need the ability to set the pace and timing of the program, because Congress retains the purse strings, and therefore the relationship of Federal and State regulators is very important and must be dealt with appropriately.

Finally, we need help with reforms that affect our closing bases. We have now 4 rounds of base closures and approximately 100 major bases around the country closing. We want to put that property to productive economic reuse, and a relationship with citizens and stakeholders is key. All Services are committed to environmental stewardship.

Thank you very much, Mr. Chairman.

[The prepared statement of Sherri W. Goodman follows:]

PREPARED STATEMENT OF SHERRI W. GOODMAN, DEPUTY UNDER SECRETARY OF DEFENSE FOR ENVIRONMENTAL SECURITY, DEPARTMENT OF DEFENSE

DOD & SUPERFUND REFORM

Mr. Chairman, members of the subcommittee, I thank you for the opportunity to testify today.

SUPERFUND REFORM

The Department of Defense and other Federal agencies will benefit from responsible reform of Superfund. As the Chairman is aware, the Administration worked closely with the Committee last year to develop a comprehensive reform bill that incorporated the reforms that are needed to improve the cleanup process at the Department of Defense. The Department is now working closely with the Environmental Pretection Agency (EPA) to implement many of those reforms administratively, and to develop further administrative changes that will yield further efficiency gains for DOD's cleanup program.

Mr. Chairman, you recently introduced H.R. 2500, the "Reform of Superfund Act" or ROSA. This bill represents a departure from the principle of responsible reform advocated by the Administration. The "reforms" this bill proposes would, in the end, lead to a much more inefficient program that would be inadequate to meet the Department's responsibility to protect human health and the environment at our facilities.

We have a range of serious concerns about the process by which the bill was developed and with the substance of many of its provisions. While your staff has consulted with DOD on issues of particular concern to the Department—consultation we greatly appreciate—neither DOE nor the Administration as a whole has had an opportunity to review the core policies and myriad technical issues presented by this bill on a thoughtful, bipartisan basis. We believe such a process is necessary to achieve a responsible Superfund reform bill that the President could sign. With regard to the merits of the bill, there are many areas where the bill is not sufficiently protective of human health and the environment. Moreover, its standards and processes are ambiguous and could lead to protracted legal challenges by those dissatisfied with the remedy selection. Further, the proposed bill would greatly increase the cost of federal facility cleanup by creating unmanageable roles for state and federal regulators. Thus, we would have to oppose this bill in its current form.

Our goal is to achieve cleanups that are protective of human health and the environment, are a cost-effective use of taxpayer dollars, and return property to local users as quickly as possible without abdicating our responsibility to cleanup those properties.

H.R. 2500 eliminates the application of applicable or relevant and appropriate state and federal laws, regulations and guidance (ARARs) for onsite remediations. However, it is not clear that ARARs are waived for federal facilities. The full waiver of sovereign immunity coupled with language allowing states to apply any and all requirements means that federal facilities will be treated differently than from private sites. Wherever possible, duplicative oversight should, be avoided, and a lead regulator (federal or state) should be designated whenever possible.

This bill sweeps too far in many areas and overlooks many issues. For example, the remedy provisions would impose a new and analytically confusing set of remedy standards on a process that already is too complex and subject to controversy. These provisions could be construed to require only "exposure control" and not cleanup. I would like to review some of the problems and also outline some specific DOD goals for economic redevelopment that the bill overlooks.

REMEDY REFORM PROBLEMS

Last year the Department participated fully in developing the Administration's bill for Superfund Reform and we continue to support the Administration's efforts. We have the opportunity to build on progress made last year. I would like to outline how some of the elements the Administration believes should be included in legislation to reform Superfund:

The Department believes that reform must take into consideration three basic principles.

1. *Polluter Pays*—The polluter must pay for past disposal practices even when it is a federal agency on behalf of the American public. H.R. 2500 will pass the burden on to the taxpayer and reward those parties who did not step up to their responsibility.

2. *Faster, cost-effective Cleanups*—While cleanups will be more cost-effective and include future land use into the remedy selection, the process may not be adequate to protect future generations from contamination by leaving higher levels of waste in place.

3. *Economic Redevelopment*—Base Closures will still encourage development in green field areas instead of fostering redevelopment in industrial areas.

Major changes to the cleanup process will yield faster, more cost effective cleanups and use more realistic assumptions when determining the threat to human health and the environment. As part of this reform, the Department helped develop and still supports the following remedy selection modifications:

- *Use standardized risk analysis* that uses realistic assumptions and incorporates future land use into the exposure assessment. We currently use a variety of methodologies and different exposure scenarios that do not necessarily reflect the future use of a site. We are concerned that many of the prescriptive risk analysis provisions will add further confusion.
- *Establish national cleanup goals* to gain consistency in remedy selections while recognizing that cleanups levels for some contaminants will need to be established through a rulemaking (such as radionuclides). We are not certain that the risk range presented in ROSA will be adequately protective.
- *Include reasonably foreseeable future land use* in the decision process to yield cleanups and reuse plans that are better coordinated in a greatly reduced time frame. Including future land use will help ensure remedies are protective for the likely use of a property after cleanup and ensure we are providing appropriate levels of cleanup in consultation with the affected communities.
- *Eliminate* the mandatory *preference for permanent remedies that treat wastes* except for the worst *hot spots*. Focusing more attention on treatment of contamination hot spots while seeking alternative or innovative ways of addressing the less contaminated areas will also provide more realistic, cost effective remedies. Unfortunately, ROSA would not provide for the treatment of hot spots.
- *Eliminate the "relevant and appropriate state and federal laws"*, regulations and guidance and apply only those laws designed specifically for cleanup. Use only applicable laws specifically designed for cleanup to develop cleanup standards and not the other state and federal laws, regulations, guidance and policies designed for other purposes. The result would be a streamlined process to establish cleanup standards. The elimination of applicable laws without careful consideration of their merit could foster distrust with our stakeholders.
- *Elevate the role of cost* when considering other factors in remedy selection. Currently, cost-effectiveness is one of nine considerations regulators use in making a cleanup decision. By elevating the importance of cost, in the manner proposed by the Administration, we can provide a more prudent use of our resources. But, the multiple and confusing cost tests in ROSA will complicate remedy selection and could lead to unprotective remedies.
- *Encourage the use of generic remedies* in order to shorten the length of study time. We have learned how to cleanup many different categories of sites and can apply this knowledge early on in the cleanup process and avoid lengthy studies when we know what the solution will be.
- *Encourage the use of innovative technologies* as a way of decreasing costs. Using new and developing technologies should be encouraged. The current system discourages the use of innovative technologies because federal facilities and private parties alike are still held responsible for meeting deadlines and schedules, even if the remedy fails to reduce contamination in the expected time because the results of innovative technology cannot always be precisely forecast. Cooperative efforts between the community, regulators and federal facilities can help find more cost-effective cleanup remedies. H.R. 2500 does not include citizen participation as fully as it should.
- *Increase role for citizens* in a structure closely resembling that used by the Department. Of remaining concern to us though is the need to recognize DOD's Restoration Advisory Boards (RABs) and the RAB process for all DOD sites. We are also concerned by the establishment of an arbitrary cap of 20 members to the community groups. Some of our larger installations are adjacent to several cities that should be represented. We have some successfully operating RABs that have over 50 members.

IMPEDIMENTS TO ECONOMIC REDEVELOPMENT

H.R. 2500 does not include provisions that allow for economic redevelopment of federal facility brownfields—especially on those properties scheduled for transfer back to local communities and business under the Base Realignment and Closure

program. Section 120(h) currently prohibits DOD from transferring land until all remedial action is completed or until the remedy is built, is in place, and is operating successfully. DOD is allowed to transfer for economic reuse those uncontaminated parcels of land known as green fields. In essence, the current law encourages development in green fields, and delays redevelopment in industrial areas of our bases.

By deferring the requirements of 120(h) and allowing us to transfer by deed when the reuse will not be harmful to human health, we will be creating incentives for reuse commensurate with the voluntary cleanup and brown fields provision of your bill. Deferral, coupled with our commitment to both cleanup and return of our closing bases to economic productivity, will keep the program on track. Our active sites cleanup program typically does not have the 120(h)(3) requirement as a driver and our progress shows that such a requirement is not needed for our closing bases. However, deferral of the 120(h)(3) requirement provides additional assurance needed for lenders and new owners that DOD remains committed to cleanup.

The incorporation of future land use into the remedy selection process provides the community, developers, and zoning boards and other land use entities the opportunity to include realistic land use into the remedy selection process and make sure that remedies are compatible with reuse. It is also a cost effective use of our resources.

DOD also seeks specific changes that will help the military return closing base properties to local communities as soon as possible. Language we sought regarding leasing has been included in the Defense Authorization bill. We also appreciate your inclusion of provisions that modify the definition of an uncontaminated parcel, clarify that uncontaminated parcels are not a part of the NPL listing and allow for the consideration of actions under other authorities when federal facilities are evaluated for listing. In order to support the economic redevelopment of our closing bases the Department still believes it is critical to include the following changes:

Modify section 120(h)(3) to allow EPA (at NPL sites) or States (at non-NPL sites) to defer the requirements of 120(h)(3) so that DOD can transfer property prior to completion of the remedy as long as the environmental regulator at the site is assured the property is suitable for transfer and the cleanup will be conducted. Today, federal property is not treated the same as private property, which can be sold even if contaminated. Federal property can only be sold when the remedial action is in place. The purpose of this proposed reform is to treat federal property transfers closer to private property transfers. Selection and completion of approved remedies can take some time. Under this proposal, transfers would be allowed at an earlier point when the regulator determines that human health and the environment are not at risk. This reform and the other base closure-related reforms will assist communities in redeveloping property at closing bases.

CONCLUSION

Environmental Security supports DOD's priorities of readiness, quality of life, and facility and equipment modernization. DOD will continue its environmental leadership in support of the military mission by protecting personnel, their families, and the surrounding communities from environmental and, safety and health hazards, through pollution prevention and a long term view of solving our environmental problems. This approach will strengthen the public's trust in DOD, lead to higher environmental quality, improve performance, and lower costs.

The Department's leadership in this area, and the efficiency of its cleanup program, would be greatly enhanced by Superfund reform that meets the concerns I have outlined here and that are more fully discussed in testimony from Administrator Browner and other Administration witnesses. The Department would have difficulty supporting H.R. 2500 in its current form but we remain hopeful that the subcommittee will engage with the Administration and the minority in a bipartisan process of developing a bill that is acceptable to the Administration, the American public and the President.

The Army, Navy, Air Force and Marines are committed to environmental stewardship. Perhaps no conclusion is more fitting than the message from the Commandant of the Marine Corps in the Trainer's Environmental Handbook for Camp Lejeune, North Carolina, which sums up the readiness and environmental concerns of Environmental Security:

> We can, and we will, find ways to train and accomplish our mission in a manner that protects the health of our people, the public we serve, and the lands that we use. As stewards of our air, land, and water, we must ensure that today's activities preserve these resources for tomorrow. Proper care of our environment's cost effective in the long term and it's the right thing to do.

Mr. OXLEY. Thank you.
Dr. Johnson.

STATEMENT OF BARRY L. JOHNSON

Mr. JOHNSON. Good afternoon, Mr. Chairman and members of the subcommittee. Our Agency commends the subcommittee for its concern for the public health impact of Superfund sites and evident bipartisan efforts to strengthen the Superfund.

In testimony presented by ATSDR to the subcommittee on May 23 of this year we described some of the key human health findings collected by our Agency under CERCLA. My testimony today will highlight changes we support in ATSDR's principal CERCLA responsibilities based on data and experience accrued since the Superfund Amendments and Reauthorization Act of 1986. My comments today are confined to provisions that would amend section 104(i) of Superfund. That is the section that specifies ATSDR's responsibilities and authorities.

Most of these provisions are contained in both H.R. 2500 and H.R. 228. Our testimony today is offered in support for the current public health provisions of section 104(i) but with recommendations for enhancements.

My testimony today addresses 4 of ATSDR's many responsibilities: public health assessments, health studies of communities, community involvement, and community and physician health education.

Concerning public health assessments, our Agency has conducted over 1,700 public health assessments of Superfund sites. We have received approximately 400 petitions for additional public health assessments of sites of concern to petitioners. About 7 percent of those petitions come from Members of Congress.

We recommend a number of changes or retentions in our current authorities as they pertain to public health assessments.

First, because sites vary in terms of current human health hazard, our Agency supports referring to EPA those sites which represent the greatest hazard to human health for their earliest consideration for remedial action.

Second, we recommend that each site be given a preliminary public health assessment, and based on the outcome, conduct a full public health assessment when warranted.

Third, earlier involvement by ATSDR in the site-specific activities of EPA would enhance our Agency's ability to work with communities and with EPA in ensuring exposure characterization of populations at potential risk.

Fourth, we recommend retention in the statute of language that gives ATSDR authority to administer grants and contracts with State and local health agencies for them to conduct health assessments.

Fifth, our experience since 1986 shows that citizens' ability to petition ATSDR to conduct health assessments provides an essential response to their concerns. We urge retention of this authority in Superfund.

Sixth, though no change in statutory authority is needed, we would like to state for the record our Agency's commitment to as-

sessing actual levels of human exposure to hazardous substances in potentially at-risk populations.

Turning to health studies, we conduct a large number of community health studies. We believe that the current authority is sufficient to conduct these studies when indicated by findings from our health assessments or similar activities.

Third, with regard to community involvement, we've had extensive involvement with communities, including community assistance panels. We support the creation of community assistance groups, CAG's, when of interest to a community, but we agree with EPA that environmental groups should be included in such CAG's. We also support inclusion of ATSDR as a party to the work of CAG's, because public health issues are always a key concern to Superfund communities.

Further, we agree that it is appropriate to broaden technical assistance grants to include the collection by grantees of health data and hiring of expert consultants to advise on health studies and related activities. Our experience with community-retained consultants has been generally positive.

Fourth, community and physician health education. The 1986 amendments authorized us to provide training and educational materials to physicians. We have had contact and impact on over 100,000 physicians since that time. We recommend that these kinds of materials and community education be considered for addition to the statute.

Mr. Chairman, we appreciate the opportunity to testify, and I look forward to the questions you may have.

[The prepared statement of Barry L. Johnson follows:]

PREPARED STATEMENT OF BARRY L. JOHNSON, ASSISTANT ADMINISTRATOR, AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY, PUBLIC HEALTH SERVICE, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES

Good morning. I am Barry L. Johnson, Ph.D., Assistant Administrator of the Agency for Toxic Substances and Disease Registry (ATSDR). We recognize H.R. 2500 seeks to provide needed reform to the Superfund program, however, the Administration believes that this bill will not accomplish its goal of protecting human health and the environment adequately.

In testimony presented to the Subcommittee on May 23, 1995, ATSDR described some of the key human health findings accrued by our agency under the Comprehensive Environmental Response, Compensation, and Liability Act, as amended (CERCLA). My testimony today will highlight changes we support in ATSDR's principal CERCLA responsibilities, based on data and experience since the Superfund Amendments and Reauthorization Act of 1986. My comments today are confined to provisions that would amend Section 104(i) of Superfund most of which are contained in both H.R. 2500, and H.R. 228 which is supported by the Administration. I defer to EPA for the Administration's overall position on the bill.

As background, CERCLA, as amended, mandates of ATSDR a broad, national program of Superfund site health assessments, health investigations, surveillance and registries, applied research, emergency response, health education, and toxicological database development. Our work is conducted in close collaboration with the Environmental Protection Agency (EPA), state health departments, and local health agencies.

As you know, the American public remains quite concerned about the potential impacts of Superfund sites on public health. Since 1991, ATSDR has received more than 4,000 requests for assistance from concerned citizens potentially affected by more than 1,000 sites. ATSDR has had direct contact since 1991 with more than 300,000 citizens concerned about Superfund and hazardous substances issues through our public meetings and other site-specific activities. Additionally, since February 1, 1995 we have received more than 45,000 requests for information via the Internet.

In ATSDR's testimony of May 23, we highlighted our findings on the impact on public health of hazardous waste sites and emergencies related to unplanned releases of hazardous substances. Five of the summary points are repeated here today for their relevance to changes we endorse in Superfund:

1. Although epidemiologic findings are still unfolding, *when evaluated in aggregate* (i.e., by combining health data from many Superfund sites), proximity to hazardous waste sites seems to be associated with a small to moderate increased risk of some kinds of birth defects and, less well documented, some specific cancers.
2. Health investigations of communities around *some individual* hazardous waste sites have found increases in the risk of birth defects, neurotoxic disorders, dermatitis, leukemia, cardiovascular abnormalities, respiratory dysfunction, and immune disorders.
3. From what we have learned about 1,309 sites assessed by ATSDR from 1987 through December 1994, completed exposure pathways (i.e., people were in the path of substances released from sites) were identified at about 40% of sites. About 60% of EPA National Priorities List (NPL) sites assessed by ATSDR in fiscal years 1993 and 1994 were found to have completed exposure pathways.
4. Of the 136 sites for which public health assessments were conducted and advisories were issued in fiscal years 1993 and 1994, ATSDR classified 54% as health hazards. Historically, 23% of 1,719 public health assessments for more than 1,300 Superfund sites represented a health hazard, according to ATSDR's criteria.
5. Physicians and other health care providers in communities around Superfund sites continue to express a significant need for training and technical assistance in matters of hazardous substances.

We consider these findings and the public's continuing concern as reinforcing the importance of the public health provisions of Superfund. The message that I bring today is support for the current public health provisions of the statute, but with some recommendations for enhancements in aspects of these provisions.

My testimony today will relate these five summary statements to changes in ATSDR's public health mandates under current law. The comments that follow will address: 1) public health assessments of Superfund sites, 2) health studies of communities, 3) community involvement, and 4) community and physician health education. The proposed changes will enable ATSDR to sharpen its focus on human health impacts of Superfund sites and to ensure that real risks to real people are promptly addressed.

PUBLIC HEALTH ASSESSMENTS

Since 1986, the Agency, in cooperation with state health departments, has completed more than 1,700 public health assessments of communities around Superfund sites. The 1986 CERCLA amendments require that ATSDR: a) conduct, within 1 year, a public health assessment of every site placed, or proposed for placement, on the NPL, and b) respond to petitions for public health assessments from individuals. Since 1988, ATSDR has received over 400 petitions for health assessments.

Almost all of ATSDR's public health programs under Superfund revolve around its public health assessments. Public health assessments are our agency's evaluation of the environmental and health data pertaining to communities potentially impacted by releases from NPL sites or sites petitioned of ATSDR. Our public health assessments are conducted using environmental contamination data provided primarily by EPA; health outcome data (e.g., birth defects), which states supply when available; and community-reported health concerns.

Public health assessments are unique in the sense that a multidisciplinary team conducts them and we involve the communities in their conduct. Public health assessments constitute ATSDR's key tool to determine the public health agenda at Superfund sites. Public health assessments are ATSDR's principal device for identifying communities that need public health followup.

The Agency's public health assessments currently place sites in specific categories of public health concern. Data from the 136 sites assessed in fiscal years 1993 and 1994 indicate that about 5% of sites presented an Imminent and Urgent Public Health Hazard. With regard to the remaining sites, ATSDR classified 49% of them as Public Health Hazards, 34% as Indeterminate (sites where key environmental data are lacking to adequately determine if persons are being exposed), 10% as No Apparent Public Health Hazard (sites where past and current exposures have been indicated but where current data indicate those exposures are no longer of public health concern), and 2% as No Public Health Hazard. Ranking and classification of

sites are not precise sciences; as databases have improved in quality, so has the ranking and categorization of sites.

Legislative Changes in Public Health Assessments: Given the large number of public health assessments conducted by ATSDR and the data accrued from them, ATSDR endorses certain changes in the conduct of site-specific public health assessments:

- Because sites vary in terms of current human health hazard, ATSDR supports referring to EPA those sites which represent the greatest hazard to human health for their earliest consideration for remedial action.
- ATSDR's exporience in conducting public health assessments indicates that the agency should be given greater flexibility in conduct of site-specific public health assessments. We recommend that each site be given a Preliminary Public Health Assessment and based on the outcome, conduct a full public health assessment when warranted. The Preliminary Assessment would focus on determining the nature and extent of any completed exposure pathways and actual levels of contaminants in people, when warranted. ATSDR considers this proposal to be consistent with the goal of more efficient program administration.
- Earlier involvement by ATSDR in the site-specific activities of EPA, would enhance ATSDR's ability to work with communities and with EPA in ensuring exposure characterization of populations at potential risk. This would lead to earlier interdictions, where needed, of persons' exposure to hazardous substances.
- As we noted in our May 23, 1995, testimony to the Subcommittee, ATSDR works very closely with state and local health departments in the conduct of public health assessments and related activities. We recommend retention in the statute of language that gives ATSDR authority to administer grants and contracts with state and local health agencies.
- ATSDR's experience since 1986 shows that citizens' ability to petition ATSDR to conduct public health assessments provides an essential response to their concerns. Over 400 petitions have been received, representing 345 individual sites. About 56 percent of petitions are submitted by citizens or citizen groups; another 7 percent are submitted by Members of Congress. We urge retention of this authority in Superfund.
- At the advice of ATSDR's Board of Scientific Counselors, the agency has incorporated human exposure measurements into its public health assessments. Though no change in statutory authority is needed, we would like to state for the record ATSDR's commitment to assessing actual levels of exposure to hazardous substances in potentially at risk populations.

HEALTH STUDIES

Based on results from site-specific public health assessments, ATSDR identifies populations in communities who are at potential risk of adverse health effects. Using authorities in Superfund, ATSDR and our state health department partners conduct health studies in such communities. These human health investigations are essential for determining the health impact of individual sites on the health of community residents. The site-specific health information becomes the source for public health interventions, like interdicting exposure to substances and alerting local physicians and health departments.

ATSDR's experience indicates communities want to know their health status and willingly participate in health studies. Participation rates typically exceed 70 percent of eligible persons.

Legislative Changes in Health Studies: ATSDR believes current authority is sufficient to conduct community health studies when indicated by the findings of public health assessments or similar reasons.

COMMUNITY INVOLVEMENT

Our agency's experience in conducting public health assessments, health studies, and community education has clearly demonstrated that effective community involvement is integral to successful public health intervention in communities near hazardous waste sites. One of our agency's most effective ways in interacting with communities is through what we call Community Assistance Panels (CAPs). ATSDR's CAPs typically involve 10 persons or more who reside in the community and represent local health concerns. Membership includes local residents, health care providers, political leaders, and members of the business community. Our work with CAPs has been important to assure community health concerns are addressed.

As an example, in 1992 ATSDR established a Community Assistance Panel (CAP) for the Brio NPL site in Friendswood, Texas. The Panel was formed because of com-

munity concerns about birth defects and other health problems in the area adjacent to the Superfund site. The panel consists of 15 people and includes homemakers, a school teacher, a hospital administrator, real estate agents, a newspaper publisher, and at one time, a local elected official. As ATSDR commenced its response to the community's health concerns, we sought and received advice from the CAP on the nature of their concerns. They shared data with ATSDR and we discussed study protocols and data collection methods with the CAP. The end result was an open, public process that developed trust between the parties. In addition, the CAP became the key community conduit for other agencies involved at the site, including the EPA and state and local health agencies.

Legislative Changes in Community Involvement: ATSDR supports the creation of Community Assistance Groups (CAGs) when of interest to a community, and agrees with EPA that environmental advocacy groups should be included in such CAGs. We also support inclusion of ATSDR as a party to the work of CAGs, because public health issues are always a key concern to Superfund communities. We also believe that it is important for ATSDR to collect and consider health and environmental data supplied by CAGs.

ATSDR agrees that it is appropriate to broaden technical assistance grants to include the collection by grantees of health data and hiring of expert consultants to advise on health studies and related activities. Our experience with community-retained consultants has been generally positive. They provide a technical resource to the community and often help clarify difficult technical issues between government agencies and a community.

COMMUNITY AND PHYSICIAN HEALTH EDUCATION

The Superfund Amendments and Reauthorization Act of 1986 added physician education language to ATSDR's mandates. Specifically, ATSDR was mandated to "...assemble, develop as necessary, and distribute to the States, and upon request to medical colleges, physicians, and other health professionals, appropriate educational materials (including short courses) on the medical surveillance, screening, and methods of diagnosis and treatment of injury or disease related to exposure to hazardous substances...".

ATSDR has responded to this mandate by developing training courses and materials on hazardous substances, diagnostic methods, and surveillance. Local physicians who practice medicine in communities around Superfund sites, in particular, have indicated the importance of credible information on the health effects of hazardous substances.

We estimate over 100,000 physicians and other health care providers have enhanced their health care practices through these courses and materials as the result of Superfund. We believe the ultimate goal of health professions education under Superfund is to integrate environmental medicine as a core element of community-oriented public health practice at the local level.

In addition to physician education, ATSDR has identified the need for community health education. For some sites, education about avoiding identified health hazards is the most effective intervention. ATSDR works closely with state and local health agencies to provide the materials and resources for use by community groups and local authorities. Our experience has been quite positive.

Some examples of this include our work at the Chattanooga Creek Site in Tennessee where ATSDR staff worked with the local health department and school system to educate children about the dangers in swimming in the contaminated creek; another is Wisconsin State Health Department's work with Hmong anglers teaching them how to avoid consumption of the most contaminated part of fish by filleting them; and a third is our work with the Panhandle Health Department in Idaho working with the community to stop planting vegetable gardens in soil contaminated with lead.

Legislative Changes in Distribution of Materials: Given ATSDR's experience with communities, we support the distribution of educational meetings and other information on human health effects of hazardous substances to the general public and to at-risk populations.

In closing, let me also note that ATSDR is one of eight agencies comprising the Public Health Service; we are the principal federal public health agency involved with hazardous waste issues. Our headquarters are in Atlanta. The ATSDR Administrator also serves as the Director of the Centers for Disease Control and Prevention (CDC). Recently, the Department has proposed to merge ATSDR with CDC under the President's reinventing government initiative. Public access to environmental health information and expertise currently available from CDC and ATSDR would be facilitated by merging these organizations. The growing expertise gai

from ATSDR s work in hazardous waste sites should be applied to other environmental public health problems. Conversely, CDC is a visible and widely known public resource for technical expertise and quick response to public health problems. Incorporating ATSDR into CDC would roduce the fragmentation of environmental health expertise and would be beneficial for the Nation s environmental health programs. Legislation will be proposed to the Congress to effect this change. At that time, more specific details will be available to the Congress.

Mr. Chairman, we appreciate the opportunity to testify. I would be happy to answer any questions.

Mr. OXLEY. Thank you, Dr. Johnson.

Let me begin the Chair's questioning with Ms. Schiffer. First of all, I would like to clarify one portion. In section 207 of our bill, appearing at page 99, that section retains joint and several liability after the completion of the allocation process.

Ms. Schiffer, you will remember last year's bill, which dealt with a similar provision of allocating responsibility, and that essential goal, that is, the club in the closet, if the parties do not agree with the allocator, comes into play. That basic theory behind the club in the closet was carried forward into H.R. 2500, and so we don't do away with joint and several but we do provide that layer of allocation so that with some degree of good fortune, perhaps, a large portion of those parties will sign off on the apportionment of the damages and then get on to cleanup.

Ms. SCHIFFER. Mr. Chairman, I am pleased to hear that the intention is to retain joint and several liability at the stage you state, but last year's bill, which is now introduced as H.R. 228 this year, specifically says joint and several liability is retained. That is not what the language on page 99 of this year's bill at the section you cite is. H.R. 2500 isn't as clear.

The concern we have is that when you have an allocation system which could be seen as giving people particular shares on the one hand and you don't specifically say that joint and several liability is retained on the other hand that you are opening up a litigation question, and we could spend a lot of time litigating.

If indeed it's the intention to retain joint and several liability, we would respectfully submit that the language should be modified to make it very clear that that is the intention. Otherwise we are opening up the opportunity for a lot of litigation and a lot of nonsettlement, which is exactly what we have been trying to preclude.

Mr. OXLEY. But you don't object to the allocation provision?

Ms. SCHIFFER. I have many reservations about this particular allocation provision. In last year's bill there was an effort to draft an allocation provision which was essentially mediation-based. We think the idea of an allocation system with a mediator-like allocator who takes in the information and then does a cut at what an appropriate allocation would be is very helpful in getting settlements in the system, and last year's bill had a lot of details about that.

We have significant concerns about this year's allocation provision because it is much more of an adjudicatory-like system, and, for example, it doesn't indicate whether 100 percent of the shares have to be allocated. So we don't know whether that means that the allocator can say that to the people in front of me I allocate 50 percent and I leave the rest. And if the allocator leaves the rest, is the rest picked up by the Superfund? If the rest is picked up by

the Superfund, then it's very problematic that the United States is not sitting as part of that process talking about what is an appropriate amount to go to the fund.

So we have a number of very specific concerns about the way that this allocation system is arranged. We think that what it will have the effect of doing is shifting many more costs to the Superfund, giving the polluters and other special interests, who frankly appear to have written this provision, a lot of ways to reduce their cost shares in a very unfair way. That will have the effect of making the fund pay much more for cleanups, or if the fund doesn't have the money to do it, not having cleanups.

Mr. OXLEY. Do you have proof of that statement, Ms. Schiffer?

Ms. SCHIFFER. Excuse me?

Mr. OXLEY. Do you have proof of that statement that these so-called special interests drafted that legislation?

Ms. SCHIFFER. I do not have proof of that, but——

Mr. OXLEY. Let me ask you this. Do you think that the joint and several liability scheme coupled with retroactive liability has fostered this litigious Superfund regime that we have been dealing with for 15 years?

Ms. SCHIFFER. Congressman Oxley, as I have testified before, I think that the strict, joint and several, retroactive core liability provisions of this statute are what are now causing it to be a significantly settlement resulting process.

Mr. OXLEY. How do you explain, then, this mountain of litigation that the statute has created?

Ms. SCHIFFER. Congressman, the bulk of litigation of this statute has been second-tier contribution litigation and in the third-tier insurance coverage litigation. The vast majority of cases where the United States is looking to the potential responsible parties do settle, and we think that having an allocation system that helps determine the contributions of parties in order to settle too is a very effective approach.

Mr. OXLEY. How long does it take to get that kind of settlement under the existing law? What's the average time for that settlement?

Ms. SCHIFFER. We would really have to look case by case at it.

Mr. OXLEY. Just an average.

Ms. SCHIFFER. I don't have an average for you.

Mr. OXLEY. Weeks? months? years?

Ms. SCHIFFER. It depends on whether it's a large site or a small site.

Mr. OXLEY. Let's say it's a large site, a multiparty site. Are we talking about a matter of months to settle?

Ms. SCHIFFER. What I can speak to is what happens when cases are referred to the Department of Justice by EPA, and we look at that case. We have a process where we send letters to people saying we're prepared now to bring a lawsuit against you, but we would prefer to discuss settlement. If a person comes in with a good faith offer, we then go into a settlement process, which moves as expeditiously as possible, and we have a number of settlements that get processed quite quickly that way.

At some Superfund sites where there are difficult issues of remedy and remedy selection, even if everybody is negotiating quickly, it does take longer to resolve it.

Mr. OXLEY. How much longer?

Mr. MARKEY. Mr. Chairman, if I may, are we operating under the 5-minute rule at this juncture?

Mr. OXLEY. Pretty close.

Mr. MARKEY. Will this be the rule for the rest of the members, in other words? We've been pretty tight in terms of the members on this side being cut off.

Mr. OXLEY. I don't plan to cut anybody off. I just hoped she would answer the question.

Ms. SCHIFFER. I am answering your question as best I can, Congressman. It differs case by case.

Mr. OXLEY. Thank you.

The gentleman from Massachusetts.

Mr. MARKEY. Thank you, Mr. Chairman, very much.

Ms. Schiffer, from 1895 to 1992, the Olin Corporation owned and operated various chemical manufacturing facilities in Saltville, Virginia. They testified before our committee earlier this year. In the 1950's, the 1960's, the 1970's over 220,000 pounds of mercury were discharged from the plant, some directly into the Holsten River in Virginia. Fishing advisories telling people not to eat the fish have been in place since 1970. EPA and Olin have agreed to a remedy in excess of $40 million, and a record of decision was signed on September 29, 1995.

Under the retroactive liability discount in H.R. 2500, would this large Fortune 500 corporation get a rebate check from Uncle Sam for $20 million?

Ms. SCHIFFER. They would, Congressman Markey, because this is a pay the polluter provision.

Mr. MARKEY. Isn't it true that this company will be eligible for a rebate check from the taxpayers even though Olin had entered into this judicial consent decree in which they had agreed to clean up the pollution they had caused?

Ms. SCHIFFER. That's exactly correct, Congressman Markey. This was a consent decree that we negotiated with Olin which acknowledged that it had responsibility at the site.

Mr. MARKEY. Ms. Schiffer, isn't it also true that Olin will be eligible for a rebate check even though a Federal court found that it had acted negligently?

Ms. SCHIFFER. It is correct. This is a pay the polluter provision, Congressman.

Mr. MARKEY. In 1990 a Federal district court ruled "we conclude Olin knew or should have known from numerous events that the discharge of mercury from the Saltville plant into the north fork of the Holsten River could cause and evidently did cause extensive property damage."

Do you think it's fair or proper for this company to get a big, fat $20 million rebate check from the American taxpayers?

Ms. SCHIFFER. In fact, these were mercury wastes that contaminated the stream and caused there to be a ban on fishing in the stream for 20 years, and I think that the American taxpayers

would be quite surprised that they were subsidizing that to the tune of $20 million.

Mr. MARKEY. Were you aware that Olin's own attorneys had warned the company back in 1976 that Olin could probably be held liable under the nuisance law or Virginia State water quality laws?

Ms. SCHIFFER. I'm sorry, Congressman.

Mr. MARKEY. Were you aware that Olin's own attorneys had warned that the company could be in violation of Virginia State water quality laws?

Ms. SCHIFFER. I believe that's correct.

Mr. MARKEY. Do you think it is fair or proper for a company whose own lawyers warned them about their liability to receive a rebate check?

Ms. SCHIFFER. I don't think the American taxpayer would want their money used that way.

Mr. MARKEY. If the bill remained in its current form, would the Justice Department recommend a veto from President Clinton?

Ms. SCHIFFER. In it's present form, I would certainly recommend that the bill be vetoed, because I think it would be counterproductive to getting quicker, faster, more efficient cleanups for the American public.

Mr. MARKEY. The Superfund appropriations this year from the House side is $1 billion a year, all of it from general revenues. How much per year would you estimate would have to be paid out in rebates on average per year out of that $1 billion?

Ms. SCHIFFER. Congressman Markey, we haven't done an independent analysis, but my understanding is that EPA has taken a look at those numbers and it's their view that it would be approximately $700 million.

Mr. MARKEY. So out of the $1 billion used for cleanups, $700 million would be rebate checks back to companies that had accepted liability for cleanups, and this is, by the way, out of a fund that is one-third lower than that which was requested and $441 million less. So all of the other cleanups would have to come out of the remaining $300 million. That's all that would be left per year, and all of it would be general revenue money coming out of taxpayers' pockets, not out of chemical company or oil company pockets under the House version; is that correct?

Ms. SCHIFFER. That's correct. It would be a very serious problem. In fact, Congressman Markey, proponents of H.R. 2500 have said with respect to Superfund funding, and I actually think it was Congressman Markey who said this, that they wouldn't want to jump into an empty swimming pool. As best I can tell about this bill, it's a swan dive, and its drafters are headed for a very rough landing in the pool.

Mr. MARKEY. I think it would be a very rough landing. You shouldn't jump in that swimming pool. There is no money in it. There is no protection for those who are going to be living in the near vicinity of these Superfund sites. The money is going to be drained out to give these checks back to polluters who had already accepted responsibility.

Ms. SCHIFFER. We think it's particularly a problem because there is nothing in this bill that indicates that the cleanups come before the rebates, and the rebates are supposed to be paid as soon as

they are submitted, so that in fact there would be very little money left for cleanups. Indeed, we would be concerned.

Mr. MARKEY. I want to give credit where credit is due. It was Mr. Oxley who had made the swimming pool comment.

Ms. SCHIFFER. I apologize.

Mr. MARKEY. I hate to take a good line away from the chairman.

Mr. OXLEY. The gentleman's time has expired. They always get us mixed up.

Ms. SCHIFFER. It's getting late. I apologize.

Mr. OXLEY. The gentleman from Idaho.

Mr. CRAPO. Thank you, Mr. Chairman.

I would like to go first to Dr. Johnson. It's my understanding that the EPA chose a remedy for the Smuggler Mountain site in Aspen, Colorado that at the time included relocating residents out of their neighborhood and initiating a multimillion dollar lead and soil removal action, and that the ATSDR later determined that this remedy was not necessary from a public health standpoint.

Can you tell me what went wrong in the system? Why wasn't the ATSDR consulted earlier by the EPA?

Mr. JOHNSON. Congressman, we were very much involved with EPA at Smuggler Mountain in various capacities. We were asked at some point by the community to actually measure the level of lead in blood of the children in that community. We worked very closely with the State health department to effect that study. What we found was that the blood levels in those children were unremarkable, and so that indicated that the lead in the environment was not getting into children, and that from a public health perspective was quite gratifying.

Mr. CRAPO. Was there a prediction from EPA modeling that there would have been a higher level of lead in the blood of the children?

Mr. JOHNSON. That is my memory of the situation, yes.

Mr. CRAPO. Do you know which model the EPA used in that analysis?

Mr. JOHNSON. I would assume, Congressman, it's the IEUBK model, but I am using memory that at my advanced age sometimes dims.

Mr. CRAPO. I can understand that. It doesn't have to be advanced age that causes that, doctor.

If I understand it correctly, then, regardless of what model the EPA was using and regardless of the predictions of that model, ultimately when a site-specific analysis was done and it found that there was not the level of lead in the blood of the children that was predicted, ATSDR concluded that the extreme remedy that was being implemented was not necessary; is that correct?

Mr. JOHNSON. I don't know that we made comments with regard to the remedy selection. We communicated our exposure findings to the EPA and to the State and in discussions with EPA indicated that we felt that the site represented a lower priority of human health hazard and that that might be a matter for EPA's consideration as they dealt with the remedy issue.

Mr. CRAPO. And that determination was based on your actual study of the lead levels in the people who lived at the site?

Mr. JOHNSON. Yes, that's correct.

Mr. CRAPO. Would it be safe to say that you believe that actual site-specific information is a better factor to rely upon than projections from models?

Mr. JOHNSON. Congressman, it has been our Agency's policy since 1986 to prefer actual measured data to data from any model, whether it's the IEUBK model or any other kind of model. There are occasions where models must be used. They need to be models that have stood the test of scientific rigor. So we as an Agency do not disavow the use of models, but our preference is always for actual data over that which is predicted by models.

Mr. CRAPO. Do you believe a model should be used if it hasn't yet been validated?

Mr. JOHNSON. As a public health official, if that model is being used for public health purposes, I would be concerned that the model have full validation.

Mr. CRAPO. Thank you.

Ms. Goodman, I came in in the middle of your testimony, and I apologize because I came in just as you were talking about a point that is of very significant interest to me, and that is the liability of the Federal Government and Federal agencies in certain circumstances. You were indicating that in some circumstances you thought it might be possible for the Federal agencies to be responsible for more than their proper share of a given site cleanup; is that correct? Did I understand your testimony correctly there?

Ms. GOODMAN. Congressman, at most of our military bases we are the sole owner; and, therefore, the liability is not an issue. There are some properties where the Department of Defense is today one of a number of potentially responsible parties; and, therefore, it is treated just like other parties, and it has to pay its share when that liability is determined.

If retroactive liability were to be repealed only for private parties but not for Federal sites, it is possible that the Federal agency at a site where there are today a number parties could be left holding the bag if that did not apply equally to the Federal agencies.

We are saying that you have to consider the Federal facilities and the impact on them as well when you look at any liability scheme.

Mr. CRAPO. Thank you.

Mr. OXLEY. The gentleman's time has expired.

The gentlelady from Oregon.

Ms. FURSE. Thank you.

Ms. Schiffer, what, in your view, is the impact of H.R. 2500's natural resource damage provisions that limit the United States to addressing NRD only at resources "owned or held in trust" and that preclude the United States from addressing NRD at "managed resources" as under current Superfund law? What is the impact?

Ms. SCHIFFER. This would be a very serious impact. Basically, what natural resource damage cases do is get resources restored for the public. In a number of sites where the resources have been damaged by years of bad treatment by companies the interest that the Federal agencies as trustee have is because they managed the land. What the provision in H.R. 2500 does is say in those instances the United States as natural resource damage trustees are out; they can't recover any natural resource damages.

This is particularly a problem, because unlike on the Superfund side of this statute, with the natural resource damages side, if there can't be recovery from the polluters, then the natural resources just are not restored. This would take out the interest of the United States at such Superfund sites as the Montrose site where for years and years and years DDT and PCB's were deposited off the coast of California. So it would have a very serious impact and make it very difficult for us to restore natural resource damages.

Earlier there was a question about the Great Lakes in this regard as well. Similarly, there are few places where the United States owns wildlife refuges in or near the Great Lakes, but generally the interest of the United States in the Great Lakes as trustee is as a manager of the Great Lakes. So under this statute our ability to recover damages as a manager would simply be done away with.

Ms. FURSE. I am thinking of out to the 200 mile limit in the ocean where the U.S. manages but does not own the fish. So would the salmon fishery on the Pacific Coast be impacted?

Ms. SCHIFFER. Actually, for these purposes anything beyond 3 miles out would be impacted. Two hundred miles is for certain other purposes and other statutes, but here, beyond 3 miles out is owned by the United States—States own up to 3 miles, I believe. But then beyond that, where the United States is the manager, if there were natural resource damages, we would no longer as the manager be able to get the natural resource restored.

Ms. FURSE. Mr. Udall states that the proposed language would appear to reduce potential natural resource damage recovery. You've talked about that, and you mentioned Montrose. Clark Fork, would it also be a problem there? Bunker Hill in Idaho? Hudson River Watershed in New York?

Ms. SCHIFFER. Yes, it would be a problem in all of those areas. I might add, Congresswoman Furse, that cutting out the United States as manager is only one of the problems of the natural resource damages provision of H.R. 2500. It has other problems as well.

For example, it has a provision that if there has been a recovery by anybody else, then the United States as trustee couldn't sue. I really think of that as the inoculation provision. It means that if one individual brings a small claim for damage and that is settled out for a small amount of money, then the United States couldn't come in as trustee and secure restoration of that resource for the American public.

Ms. FURSE. Say one fisherman sued because of a loss of a year's fishery. There could be no recovery for all the fishermen with the United States as the trustee for that fishery? You are saying that the United States would be precluded from recovering resources for that class of people?

Ms. SCHIFFER. The United States would be precluded from getting further restoration of that resource for the American public. Not just a recovery for those fishermen, but for really restoring the fishery or doing other natural resource damage repair.

Ms. FURSE. The restoration at Bunker Hill and Coeur d'Alene, which I am interested in in particular, the State has settled its

claim. Would you say that H.R. 2500 might jeopardize the restoration where there is a settlement of claim by the State?

Ms. SCHIFFER. Bunker Hill is a particularly interesting case. It's a very seriously damaged place that came out of years of mining activity. The State there in its capacity as trustee brought a lawsuit, and then the State legislature stopped funding the lawsuit, so the State lawyers had to just settle it out for about $4 million. Actually the United States then brought a substantial natural resource damages lawsuit which we are working to get resolved. That additional effort by the United States to restore what is hundreds of millions of dollars of natural resource damages would be precluded if a like circumstance happened—it would be precluded if the provisions of H.R. 2500 took effect.

I have to add we are talking about this as natural resource damages, but who is really hurt is the American public who lives near these natural resources and wants to take advantage of these natural resources.

Ms. FURSE. Thank you, Mr. Chairman.

Mr. CRAPO [presiding]. Thank you.

The Chair next recognizes the gentleman from Washington.

Mr. WHITE. Thank you, Mr. Chairman.

Ms. Schiffer, welcome, and the other members of the panel. We appreciate your coming today.

Ms. Schiffer, as a representative of the Justice Department, I'd like to get your thoughts on whether you think excessive litigation has been one of the problems that the current law has suffered under the 1980 and 1987 statutes that we passed.

Ms. SCHIFFER. Congressman White, I'm a lawyer, so of course it always pains me to say this, but I certainly think that indeed this statute has suffered from excessive litigation, and one of the things that we are trying to do with reform, both administrative reform and legislative reform, is to reduce the amount of litigation, not increase it. We think H.R. 2500 would increase the amount of litigation.

Mr. WHITE. Right. I understand that, and I actually want to get into 1 or 2 questions about that. What would you say, though, under the current program are the elements of the current program that have led to excessive litigation? Where do you think the problem lies?

Ms. SCHIFFER. I think, as with any new statute in the beginning, however hard we and the Congress work at having clear terms, there is always what I think of as the shakedown period when there is litigation over what the statute actually means. In fact, when Superfund was first passed there was litigation over its constitutionality, how does the liability system work, and so forth.

That happens, frankly, with any new statute. The more vague the terms are, the longer the statute, the more that is likely to happen. That has happened in Superfund. That shakedown period has essentially passed for most of the provisions in the existing statute.

Then, in addition, there has not been so much litigation about whether people are in or out of the system because a strict liability system means you know whether you are in or out of the system. I think there has been contribution litigation, which has been one

of the biggest problems in this statute, that is, the litigation that brings the little guy in. We are very interested in ending that. We want the small contributors and the little guys who don't have ability to pay out of the system. I understand that the committee does too. In the coalition proposed legislation that is now H.R. 228 we think there are a number of steps that do that.

We think that goal motivates some of the provisions in H.R. 2500, but we think they don't do it in a way that will get rid of the litigation.

Mr. WHITE. I agree with you that in any statute there is kind of a shakedown period; it's kind of hard to change that result; if you are doing anything significant, there is always going to be some litigation over exactly what Congress intended. My own sense is that the problem at least in the last 10 years or so with Superfund has been private litigation over specific cleanup sites because there is just such potential liability that you've got a real incentive there for people to have private litigation to avoid those things.

Looking at your testimony about H.R. 2500, you have a list at the end of it on page 30 about the provisions of this bill that you think will entail additional litigation. Isn't it fair to say that most of these things could be characterized as shakedown sort of issues that frankly you are not going to avoid unless you can somehow anticipate every issue that is going to come up? Some of it is just inevitable.

Ms. SCHIFFER. I certainly think that some litigation is inevitable, as I indicated, in the shakedown period. I do, however, think that a number of these categories of litigation could be avoided.

For example, if the intention is to be clear about retaining joint and several liability, then writing it in clearly means we won't have to litigate about whether it was intended to be written in clearly rather than this provision.

We think, for instance, litigating over whether somebody meets that 1 percent comparative test for de minimis is going to go on. That isn't a shakedown period provision. My belief is that that provision is motivated by trying to get the little guys out, but it is done in a way that isn't going to have that result because it's a comparative standard.

So I think some of these are shakedown and some are not.

Mr. WHITE. How would you improve that on the 1 percent issue? It's a pretty darn clear test that you have some factual litigation: is it 1 percent or not? But as far as the legal standard is concerned, I don't know how you can be much clearer than to say 1 percent.

Ms. SCHIFFER. Certainly 1 percent is clear. However, it's a comparative standard. This is an exemption, not a settlement. So it means you have to determine exactly all the waste at the site, which is a somewhat shifting, difficult to discern number. Which means that determining 1 percent of this difficult to discern number is going to be the subject of litigation.

What we had proposed in H.R. 228 is that the de minimis people get out on a settlement standard so that it doesn't have to be so precise—rather than having it be an exemption. What we would exempt is by a non-comparative standard, that is, by saying somebody who contributes a certain number of barrels or gallons gets

out. That way it's a non-comparative standard; you know it when you have it; and that person can be out of the system.

Mr. WHITE. Mr. Chairman, could I have unanimous consent for just one follow-up question? I don't mean to delay and I know there are some other members waiting, but I do have just one follow-up question on that issue.

Mr. WYDEN. Mr. Chairman, I would ask unanimous consent that my friend from Seattle be allowed an additional question.

Mr. CRAPO. Hearing no objection, you have 1 additional minute.

Mr. WHITE. Thank you very much.

There is a site very near to my district, the Tulalip landfill site in the north, in the State of Washington where we have exactly the problem we are talking about, a lot of small people involved. Frankly, they are right now under a procedure where the local authorities are trying to settle with them on a blanket settlement basis. I think it's similar to the sort of thing you are proposing. I can tell you they are just screaming bloody murder about it. They all feel that they are being extorted to pay for damages that they really think are unfair. Wouldn't a more effective way to solve this problem simply be to get rid of liability for municipal landfills? It certainly would be simpler, I guess.

Ms. SCHIFFER. Let me first start by saying I'm not familiar with the Tulalip site, so I can't speak to its particular facts.

We think that certain kinds of carve-outs may well be appropriate, particularly in circumstances where the transaction costs, for instance dealing with vast numbers of very small entities, really outrun the benefit you get from the cleanup, and we are quite prepared to entertain those kinds of carve-outs. We think that the municipal landfill carve-out that is in H.R. 2500 is much, much broader than that and has a lot of specific problems which I would be pleased to address. Let me give you a couple of examples.

Because it is so broadly drafted and so unclearly drafted, it may well go very much beyond the kind of site you are describing where what it's basically made up of is a lot of small household waste kind of contributors. So it could well cover something like the Lipari landfill site.

The Lipari landfill site is a site in New Jersey where there were many, many industrial contributors and then a little bit of household waste. Under H.R. 2500 that may well be exempted as meeting the standard of municipal liability. So it would go way beyond what you are saying.

Another example, and I know this will be startling to you, is that it could indeed be that the Love Canal site would meet the test for a municipal landfill that was exempted under this because there was some municipal waste that was brought to that site.

Mr. WHITE. Thank you, and I thank you, Mr. Chairman.

Mr. CRAPO. The time of the gentleman has expired.

The Chair next recognizes the gentleman from Oregon.

Mr. MARKEY. Would the gentleman from Oregon yield just briefly?

Mr. WYDEN. I'd be happy to.

Mr. MARKEY. I would ask unanimous consent that he be given 1 additional minute for the time I'm about to consume, if the Chair would be gracious enough to extend him that time.

I just wanted to zero in on one point with Ms. Schiffer. There are $700 million a year which will be rebated to polluters. There is another $500 million carve-out for co-disposal sites per year that will also be sent out in Federal dollars as well; is that correct

Ms. SCHIFFER. Again, Congressman Markey, we haven't done our own independent money analysis, but my understanding is according to EPA that the combination of the rebate provisions and the carve-outs would add over $1 billion a year to the Superfund costs.

Mr. MARKEY. Since the whole fund is only $1 billion a year and the rebates to polluters plus the co-disposal is over $1 billion a year, there will be nothing left over for all the other sites in the country.

Ms. SCHIFFER. There would be very little money left for cleanup. That's correct. And it could well have the effect of shifting cleanup responsibilities to the States without funding.

Mr. MARKEY. And it will be the general taxpayer who will be picking it up. That is, someone making $35,000 a year's money will be going for these expenditures and there will be a cut in student loans and in Medicare Part B, where they want their money to go instead to polluters.

Mr. OXLEY. What about widows and orphans? Would they suffer greatly?

Mr. MARKEY. All in the Medicaid program. No question about it.

I thank the gentleman from Oregon for yielding.

Mr. WYDEN. Ms. Schiffer, on this matter of the cost, you said in your testimony the liability exemptions would cost $1 billion more than the current budget. Our chairman, Mr. Oxley, mentioned a $3 billion surplus in the trust fund that could make up the shortfall, in his view. By anybody's calculation, the surplus is used up after 3 years. Where does the extra money come in year 4?

Ms. SCHIFFER. Congressman Wyden, I think it's like anybody else who spends down their savings account. If you spend down your savings account, then you end up with no extra money, and basically what would happen is cleanups would either be stopped or slowed because there would not be money to fund those cleanups, and with the operation of the liability system that is in H.R. 2500, there would be fewer payments by the polluters in the first place, and in addition the government's ability to use ordering authority to get the people who put the waste there to conduct the cleanups would also be limited.

So the short answer is there wouldn't be money to do it and what it would mean is cleanups would be slowed down or stopped for the American public.

Mr. WYDEN. I appreciate that answer, because to me that's the bottom line. Every time you hold this proposal up to the light, what you see is that our taxpayers are going to be faced with 1 of 2 choices. Either they are going to get shellacked and they are going to have to put up the additional money themselves, or we are going to risk additional contamination and threats to public health. I appreciate your clarifying that for me.

On this matter of litigation, the gentleman from Washington made a point that I don't think any of us disagree with, and that is that there is far too much litigation today. The question is, how

does ROSA extricate us from this legal swamp that we now find ourselves wallowing in?

When I look at the bill, it seems to me by eliminating the pre-enforcement review bar, creating this cumbersome allocation system, creating liability exemptions that are going to generate litigation, converting the NRD program from a settlement program into litigation, you take those 3 or 4 areas very specifically, and they are a freeway to more litigation and transaction costs; is that right? How do you assess it?

Ms. SCHIFFER. We agree with that assessment, Congressman Wyden. We are very interested in reducing the transaction costs and ending as much litigation as possible in this program and turning it even further into a settlement model, getting on with the cleanups. As you have indicated, there are a number of provisions in H.R. 2500 which, as you say, are a freeway to litigation. We are going to spend a lot more time in court, not a lot less time in court with the provisions in this bill.

Mr. WYDEN. One additional question, if I might, Mr. Chairman.

Our colleague Ms. Furse has done pioneering work in terms of promoting new, innovative technologies in the environmental area. I think we would all say that this is a win-win situation. I don't see much in H.R. 2500 that is going to encourage these innovative technologies that Congresswoman Furse has done so much to promote. Do you think that's a critical component that is missing from ROSA, Ms. Goodman?

Ms. GOODMAN. I do believe that we need to encourage the development of innovative technologies as a way of decreasing costs. I will say, like Ms. Schiffer, given the magnitude of H.R. 2500 and the time we had to look at it in detail, I have not had ample time to review it and give you as full an answer as I think you would like. However, I would say that innovative technologies are very important to us and that we want to see included in any Superfund reform a very strong provision that encourages the development of innovative technologies and addresses a number of issues, including what we think are some liability issues associated with those today.

Mr. WYDEN. My time is up. I know my friend the chairman is going to jump in and make an argument that the bill deals with it.

Mr. OXLEY. I'm actually going to read the bill.

Mr. WYDEN. What we want is a path to a specific way to promote these innovative technologies rather than some very generic kind of outlines. This is an area, it seems to me, that is ripe for working in a bipartisan way with the chairman.

Mr. OXLEY. That's a good statement. I would refer my friend to section 602, Innovative Technologies for Remedial Action at Federal Facilities. I would ask our friend Ms. Goodman to review that.

This legislation is all about encouraging new technologies that we have had numerous witnesses testify to in the past. We would encourage that and look forward to working with the gentleman from Oregon and Ms. Furse towards that end.

The gentleman from Ohio.

Mr. BROWN. Thank you, Mr. Chairman. I just have one question of Ms. Schiffer.

I asked Administrator Browner about the Great Lakes and the large amounts of PCB's and dioxins that remain in the Great Lakes. Breast cancer and prostate cancer rates in northeast Ohio are some of the highest rates in the country. There have been some scientific links between PCB's and breast cancer rates. What will this bill mean down the road if ROSA passes in any similar form to what it is? What does it mean to cleanup of existing PCB's in the Great Lakes, especially in the shallowest of the Great Lakes, Lake Erie?

Ms. SCHIFFER. Congressman, the NRD provisions would mean that it would be very difficult to get the natural resource damages of the Great Lakes restored. When the United States is trustee as the manager of the Great Lakes rather than as the owner, it would no longer be able to recover natural resource damages in that capacity. Since the vast majority of the United States' activities in the Great Lakes are management activities rather than ownership activities, it would no longer have the right as trustee to recover under this statute. It would be a great setback for helping to restore the Great Lakes.

Mr. BROWN. So it would in a sense be an unfunded mandate that the States would have to take up, or it would remain as is, correct?

Ms. SCHIFFER. The States would have to come in in their ownership capacity and see if they could seek recovery, but it would basically mean it would be much more difficult to recover natural resource damages, particularly for the Great Lakes, which are interstate in some sense, and it's not clear under this bill what a State could do about getting at damages that caused harm within the State but that comes from outside the State.

Mr. BROWN. Thank you. Thank you, Mr. Chairman. I yield back the balance of my time.

Mr. OXLEY. The gentleman yields back.

The gentleman from California.

Mr. BILBRAY. I was interested in the statement where you indicated that if there had been a case filed, let's say the public fisherman case, that somehow it would preempt anyone else being able to step into it.

Ms. SCHIFFER. Congressman Crapo, under the natural resource damage provisions in the statute——

Mr. BILBRAY. It's Bilbray. We all look the same. I apologize.

Ms. SCHIFFER. Under the natural resources damages provision of the bill, and I don't have a citation for you, but I will provide it to you, there is what we think of as a very overbroad provision which is designed to see that there isn't double recovery.

We, of course, agree there shouldn't be double recovery, and the current statute itself has pretty clear provisions about no double recovery. This provision on no double recoveries, however, would mean that if somebody brought a lawsuit, like an individual fisherman, and got reimbursed arising out of the damages caused by, let us say, ongoing PCB or DDT contamination, that would be it. I'm sorry, you're Congressman Bilbray but you are sitting behind Congressman Crapo's sign.

Mr. BILBRAY. That's okay. Everybody gets me mixed up with my cousin who left this year.

Ms. SCHIFFER. I'm sorry.

What it would mean is that first suit would be what could be brought, and after that further efforts to get restoration would be precluded under this very overbroad double recovery provision.

Mr. BILBRAY. That's only if you assume that the total damage had been recovered.

Ms. SCHIFFER. It would be for the damages caused in that area.

Mr. BILBRAY. In other words, the trustees could not seek other NRD claims?

Ms. SCHIFFER. Under this overbroad double recovery provision, the trustees would not then be able to seek recovery for the damages to natural resources because there had been one suit.

Any claim will bar a subsequent claim, I think is another way to put it.

Mr. BILBRAY. You just started off by saying it doesn't necessarily if it doesn't constitute a double dip and that you don't want the double dip. Now you're saying that even if it doesn't constitute the double dip, you still are going to be restricted from being able to step into it. First come, first serve, and that's all you get.

Ms. SCHIFFER. That is the way that the bill is drafted, first come, first serve, and that's all you get even if it is for a very, very narrow part of what happened at the site. We think that is very over broad and will have the effect of meaning that the American public can't have natural resource damages restored because, for instance, the single fisherman brought a suit to deal with that single fisherman's problems at the site.

Mr. BILBRAY. Have you or your Agency proposed to change existing law to make sure that doesn't happen? It's in existing law right now.

Ms. SCHIFFER. No. Excuse me, the provision against double recovery that is in existing law right now is a much more narrow provision, and, as far as we know, that part of the natural resource damage statute has worked very effectively. There haven't been complaints about double recovery.

Mr. BILBRAY. As far as we know, it has worked very effectively. I think the interpretation here is that having this type of section has worked appropriately in the past, but your concern is that you are opening it up too much. Intelligent people can disagree what is an appropriate level of participation of the system to be able to avoid the double dipping but still not have an abuse.

You say the existing law hasn't created the abuse and you are concerned that the new law may. I think there are those that say, look, they are so close together that there is no reasonable reason to think the abuse will get in there. I think that is one thing that time has to prove. We can all say back and forth about how great the existing law is or how bad the existing law is, but there is also the chance at any time, being progressive, that there are things that can be pointed out in any change that maybe it will do this, but we don't have strong evidence to show that it has done it in the past and will continue to do it.

Ms. SCHIFFER. We think that H.R. 2500 on this issue of double recovery is a very dramatic change from the existing law. Under it, what it would mean is, in the example I gave at the Bunker Hill site where the State of Idaho in its capacity as trustee brought a suit and then dismissed it for $4 million, at a site where there are

hundreds of millions of dollars of damages, that nobody could go in and get those hundreds of millions of dollars of damaged resources recovered. That is very different from the present law and is really not just an incremental change; it is a dramatic change that will have the effect of meaning that we cannot get our natural resource damages restored for the American public.

Mr. OXLEY. The gentleman's time has expired.

Mr. BILBRAY. Thank you, Mr. Chairman.

Mr. OXLEY. The gentleman from New York.

Mr. MANTON. Thank you, Mr. Chairman, and thank you, Ms. Schiffer, for your testimony here today. I have a few questions regarding H.R. 2500.

First, I want to make clear that I am very concerned about the liability provisions in the current Superfund program. Its broad application across numerous parties has made for great difficulties for particular groups that are often unable to bear the brunt of liability for cleanup costs. I am very sympathetic to those groups, particularly municipalities, and I supported the cap on liability for local governments at municipal landfills that was included in last year's legislation.

While I am interested in a Superfund program that is fairer to these parties, I have some concerns about the language of the exemptions included in H.R. 2500. In particular, H.R. 2500 includes a liability exemption at municipal landfills that includes those sites that were "authorized by the appropriate State or local government authority to accept and did accept for disposal household waste."

What do you understand the word "authorized" means in this proposed statute, and do you foresee any unintended consequences?

Ms. SCHIFFER. We think that the words are very unclear. It is once again open to litigation, and we think that there can be some very surprising consequences. We think what it could well mean is that at a site which is filled with industrial waste that has been brought by big companies but with a small amount of waste brought by a municipality, that that could nevertheless be covered by that carve-out. I can give you a couple of examples.

The Lipari landfill in New Jersey is such an example, and then the one that I think is most surprising, as I indicated, is that Love Canal is a site where there is some municipal waste. Love Canal was the quintessential site, held up as the example when the original Superfund statute was passed. We were trying to fix the Love Canals of the world, and Congress was certainly trying to fix the Love Canals of the world.

Indeed there is some municipal waste that has been brought to Love Canal that could therefore be seen as authorized for municipal waste. We think that it's certainly possible that the big company at Love Canal will litigate over the question of whether Love Canal is totally exempted from the bill as a result.

Mr. MANTON. I don't know if this has been asked before. What is your view on the preemption by the feds in the area of preempting State cleanup statutes at a time when we are talking about restoring powers to the States, and so forth?

Ms. SCHIFFER. That is really a remedy issue and I am less conversant with the remedy provisions of the statute. Ms. Goodman may want to address that, but the one thing I can say is that we

certainly are in a circumstance where I know that preemption raises a lot of sensitivities at this time.

Mr. MANTON. Perhaps Ms. Goodman might have a comment.

Ms. GOODMAN. In the Department of Defense we believe that it is important to work closely and carefully with the States because they are certainly very much affected by what we do to clean up military bases.

At the same time, you must understand that we have been managing the Defense cleanup program under a declining budget for the last several years. Indeed, the resources that Congress appropriated to the Department of Defense for environmental cleanup have dropped 25 to 30 percent over the last couple years, which means that we have to have some ability to manage a national program under declining resources and to adjust accordingly.

We want to involve States and citizens as much as we can in that process, and we have created a process through our Restoration Advisory Boards (RAB's) to do so. We would like to see that recognized in any Superfund reform statute.

I also think there has to be a very careful balance between Federal and State authorities for regulating Federal facilities, recognizing that you in Congress continue to hold those purse strings and will therefore hold the Department of Defense accountable for decisions which could then be made by 50 different States.

Mr. MANTON. Mr. Chairman, I yield back the balance of my time.

Mr. OXLEY. The gentleman yields back.

The gentlelady from Arkansas. Have you had a round?

Mrs. LINCOLN. No, sir, I haven't.

Mr. OXLEY. Welcome to the round.

Mrs. LINCOLN. Thanks. I'm glad to be back in the ring.

Congressman Wyden kind of touched briefly on the reopening of the records of decisions. I guess I have a few questions on that, the potential future litigation.

I am not a lawyer, but to me this would seem like it would be a tremendous precedent that you are setting. If you are going to reopen a judgment or a decision or a negotiation that had been completed, why would you ever want to negotiate an agreement or something to begin with if you can always go back and reopen it? Is that not a concern from a judicial standpoint?

Ms. SCHIFFER. It certainly is a concern. What it will mean is that a lot of cleanups that are ongoing or that are ready to get started will get stopped in their tracks as people go off to court and talk about what the problems are in those cleanups rather than getting on with the cleanups.

We found the pre-enforcement review bar to be a very good provision for saying people can get on with their cleanups, which is, after all, what we want to do. Doing away with that pre-enforcement review bar, which H.R. 2500 does, would have just the effect you say. It would make people not want to get on with it but indeed slow it down.

Mrs. LINCOLN. I think from some previous discussions from questions you all came up with a number of approximately 700 of these ROD's that would be affected by a reopening. Is there any indication or can you give us any estimates as to what the litigation and administrative costs would be in terms of that?

Clearly we have a program that is broken and is not working and we are spending far too much money and time on litigation and not enough on cleanup. If the whole purpose of redoing Superfund is to get something that works, do we not just fuel that fire by opening it up? Instead of eliminating that litigation, are we basically opening it up for more; is that not correct?

Ms. SCHIFFER. That's absolutely right. Administrator Browner testified that there are about 700 ROD's that could be reopened, that people could go to court for, and so instead of getting this out of the courtroom, out of the swamp, as I think somebody said earlier, we would drive it right back into the courtroom, back into the swamp of litigation.

It would be quite the opposite of streamlining. This would also be something that isn't just a shakedown period problem as we discussed earlier. This would be something that would be ongoing, as a way that you could slow down cleanups and keep things in court rather than getting cleanups.

Mrs. LINCOLN. Do we have any cost estimates on this, not only time, but more importantly, I guess, in these precious dollars that we would like to put towards cleanup?

Ms. SCHIFFER. What we do know is that going to court costs money. This would be an example where going to court wouldn't improve the process and wouldn't get better, more efficient cleanups, so it would really be just a completely unnecessary expenditure of money that could better be put to cleanups.

Mrs. LINCOLN. But we don't have an estimate. Is that what you are telling me?

Ms. SCHIFFER. We do not. That's correct.

Mrs. LINCOLN. Do we hope to?

Ms. SCHIFFER. What we know is that if up to 700 ROD's can be reopened and we had to litigate each one of those, it would be a very high amount of money that would be the cost.

Mrs. LINCOLN. But we are not going to look for a cost?

Ms. SCHIFFER. If you would like, we could work with EPA to see if we could submit to you some estimate of what the cost would be.

Mrs. LINCOLN. It would be helpful to get an estimate.

My other question relates to the rebates. The 50 percent rebate on the cost of cleanup. I guess we need some clarification whether this 50 percent would come from the general Federal pool of money. Is there any priority where that peol of money has to be spent? Would we see a priority in terms of moneys going to deal with orphan shares and exemptions first and then to rebates, or would there be any priority where those dollars were being spent?

Ms. SCHIFFER. Under H.R. 2500 as it's written there are several funds of money created, but one fund of money is created that would be used to do cleanups and to give the rebates and for some other purposes. Within that fund there is no priority specified as to whether cleanups come before rebates. In fact, what there is is a provision that the rebates have to be paid as soon as the bills are received. So that indeed, while there is no indication what the priority would be, in order of time it may well be that the rebates would come before the cleanups, which seems to be a very serious problem. So you could spend down the entire fund on rebates rath-

er than using this money to clean up these hazardous waste sites that the American public doesn't want to live near.

Mrs. LINCOLN. Mr. Chairman, can I ask for 1 additional minute to ask 1 more question?

Mr. OXLEY. Without objection.

Mrs. LINCOLN. Thank you.

Going a little bit further on that, I guess my question would be in terms of the rebates. I am trying to read from the legislation, talking about "shall be eligible for reimbursement for funds for 50 percent." It goes back to those that occurred prior to January 1, 1987. So in essence, between 1980 and 1987, those that were knowingly contributing would still get the 50 percent rebate for those years?

Ms. SCHIFFER. If people deposited waste at the site between 1980 and 1987 when they perfectly well knew, because the Superfund law was in place, that they ought to be having to pay to clean up those wastes, then nevertheless, if the cleanup expenditures come after a date in October 1995, they would get the rebate on those cleanup expenditures.

Mrs. LINCOLN. All the way back past 1987 too?

Ms. SCHIFFER. For the rebate provision, the rebate goes to expenditures that are made after a date in October 1995. But a lot of expenditures where the wastes were put in earlier are now going to be expenditures that are incurred from here on out. So there would be a lot of paying back to be done even for people whose waste was there after Superfund became the law.

Mrs. LINCOLN. Thank you very much, and thank you, Mr. Chairman.

Mr. OXLEY. The gentlelady's time has expired.

Before dismissing the panel, the Chair would say that this committee has a rule that testimony be submitted to the subcommittee 2 days before the hearing. The administration witnesses had at least a week's notice when this hearing was going to take place. We received the EPA testimony at 8 o'clock last night.

Your testimony, Ms. Schiffer, arrived this morning. I know you had enough time to rehearse your answers for Mr. Markey's questions.

It seems to me that this committee ought to have enough respect from the administration that they would submit their testimony so that the members would have an opportunity to review that before that was the case.

I know you have got problems with OMB. It was ironic that the then majority party was critical of OMB under the Bush administration and the Reagan administration. You may very well have the same problems with OMB, but I would suggest that in the future the administration get its act together and get this testimony made available. We bent over backwards to provide you with a forum and even moved this another week because of our debate on Medicare last week, and we would hope that the administration witnesses would show the same courtesy to this committee as we have shown to them.

Mr. BILBRAY. Mr. Chairman.

Mr. OXLEY. The gentleman from California.

Mr. BILBRAY. Mr. Chairman, I would ask your indulgence to ask 1 last question of the panel before dismissing them, please.

Mr. OXLEY. Without objection.

Mr. BILBRAY. Ms. Goodman, I represent an area that has 11 military installations in the district, San Diego. One thing I've learned over the years working in environmental health is, contrary to what we say in Washington, the greatest polluters in the world tend to be government, not the private sector, military installations being probably one of the scariest parts of our strategy in implementing public health protection. When a military base is listed under the NPL, right now it's unclear if the entire base is identified and listed as a site from fence line to fence line or if just the property that is directly impacted by the problem is identified. This kind of hits near and dear to me, because I live a block away from one of these sites.

The question is, is the whole base going to be identified or are we going to clarify where these boundaries would be with the military installations? We are going to have to pay the piper now. We set rules on the private sector and say we want to find fault; we don't want to find answers as much as we want to find fault, and now we are finding a lot of problems.

What is your clarification of where the site is, and would you clarify that for one father?

Ms. GOODMAN. Let me say, Congressman, that we believe in Defense it is very important for us to clean up contaminated sites, and we have quite an aggressive program to do that, devoting approximately 70 percent of our funds to actual dirt moving cleanup.

On the question of listing on the NPL, I believe it is important that EPA have the discretion not to have to list the entire base on the NPL and to be able to concentrate on those portions of the base that indeed warrant that attention.

The practice in the early days was to list the entire base fence line to fence line. That made for a lot of additional work, because you had to include parts of the property that were really not contaminated. We want to focus on the area that has a real contamination so that we can protect human health and the environment. We have been working with EPA so that they will develop an administrative reform to allow that discretion at our NPL sites.

I think it's very important, because we want to be able to put the taxpayers' dollars on the most important part of the property.

Mr. OXLEY. One final question. We've got 3 panels to go.

Mr. BILBRAY. How will this bill help to solve the problem? Does this bill specifically address that problem?

Ms. GOODMAN. Yes, it does, and we believe that's important. It does address that issue.

Mr. BILBRAY. Thank you, Mr. Chairman. I only want to point out we have wildlife people that wanted to set aside for habitat preservation, but the area that has been set aside for wildlife habitat preservation has been encumbered as hazardous and it didn't reflect reality. This bill would change that and allow us to straighten those problems out.

Mr. OXLEY. I thank the gentleman and I thank the panel.

Okay. I would like to welcome and introduce our fourth panel, but first yield to my friend from Ohio for the purpose of introduction of one of our witnesses. The gentleman from Ohio.

Mr. BROWN. Thank you, Mr. Chairman. It's my pleasure. I have to go to the floor for reconciliation and to speak on that. I appreciate the chairman's giving me a moment. It is my pleasure to recommend, to introduce and just to say hello to Charles Bowman, who is the CEO, has been the CEO for 1½ years at BP America and has had quite a career with BP in Australia and in England and now back in the United States.

I have, although I am not going to be able to stay for the testimony, I have read his testimony and I think what he says as a company particularly that has been a very good corporate citizen in Cleveland and Northeast Ohio and Mr. Bowman's reputation is very much the same, as a good citizen.

His comments about the proactive way that BP America has acted towards cleanup and the way they have done the kind of environmentally responsible job that many other companies in this country have done, I think his comments about retroactive liability and fairness will be particularly appropriate for the committee to hear so it is my pleasure to say hello and to introduce Chuck Bowman.

Thank you, Mr. Chairman.

Mr. OXLEY. I thank the gentleman and the other witnesses will not get nearly as good an introduction.

I'd like to introduce the panel: J. Lawrence Wilson, Chairman and CEO from Rohm and Haas, representing the Chemical Manufacturers Association; Ms. K.C. McKee, from the NFIB, National Federation of Independent Business; Mr. Boyd G. Condie, a Council Member from the City of Alhambra—I assume that is California; the aforementioned Dr. Bowman; Mr. Robert N. Burt, not a stranger to this committee, Chairman and CEO from the FMC Corporation; and Mr. George Baker, Esquire, Executive Director of Superfund Reform '95, based here in Washington.

Gentlemen and the lady, we thank you for being so patient.

Mr. Wilson, I understand that you have time constraints and we'll begin with you and hope we can keep you around as long as possible. Mr. Wilson.

STATEMENTS OF J. LAWRENCE WILSON, CHAIRMAN, ROHM AND HAAS, ON BEHALF OF CHEMICAL MANUFACTURERS ASSOCIATION; KATHRYN McKEE, NATIONAL FEDERATION OF INDEPENDENT BUSINESS; BOYD G. CONDIE, COUNCIL MEMBER, CITY OF ALHAMBRA, CA., ON BEHALF OF AMERICAN COMMUNITIES FOR CLEANUP EQUITY; CHARLES H. BOWMAN, PRESIDENT, BP AMERICA, INC.; ROBERT N. BURT, CHAIRMAN, FMC CORP., ON BEHALF OF BUSINESS ROUNDTABLE; AND GEORGE D. BAKER, EXECUTIVE DIRECTOR, SUPERFUND REFORM '95

Mr. WILSON. My name is Larry Wilson. I am Chairman and CEO of Rohm and Haas and I appreciate the opportunity to testify on Superfund liability issues on behalf of CMA, the Chemical Manufacturers Association.

Mr. Chairman, Rohm and Haas and the chemical industry have been on the front lines of Superfund from the very beginning. Rohm and Haas was one of the very few companies to support the original Superfund law when it passed in 1980. Since then Rohm and Haas has committed close to $200 million to the cleanup program, which represents one-eighth of our net worth, and the chemical industry has committed billions more. These have not been sound investments.

We support the goals of Superfund, Mr. Chairman, but like virtually every other stakeholder we are unhappy with the results. You are working to improve this law and we appreciate the leadership you have provided.

We fully support this committee's efforts to make comprehensive Superfund reform a reality this year.

Mr. Chairman, as with all things related to this controversial program, your bill has been the subject of controversy, especially the provisions dealing with liability reform. As the chairman of a company who has faced the unfairness of the current liability provisions, I feel that your bill strikes a good balance. It provides as much liability reform as the current funding system can afford. It is responsible legislation.

Whether or not we can all agree on the specifics of liability reform, there is one thing we can all agree on, that tax dollars raised for Superfund should be spent on cleaning up hazardous waste sites.

I am deeply concerned by recent actions of the Senate Finance Committee to extend Superfund taxes in the budget reconciliation bill by diverting Superfund taxes to pay for other programs. That action could have the unintended effect of making comprehensive Superfund reform in this Congress unattainable.

I urge this committee to do everything in its power to channel Superfund taxes for their intended use, cleaning up contaminated sites.

Mr. Chairman, I said earlier this bill is responsible legislation. It offers as much liability reform as the current system can afford. Personally, I am among those who would prefer complete repeal of Superfund's retroactive liability system. I have been on the receiving end of its inequity.

However, I could only support such an approach if it were adequately funded and only if it means no slowdown in the pace of cleanups. The chemical industry, like this committee, cannot support any plan that results in more delay in cleanups and more uncertainty for businesses and communities alike.

The bill is a dramatic improvement over the status quo. It replaces the joint and several liability standards, one of the most unfair provisions of the current law, with a rational system for allocating responsibility. The bill also takes a real bite out of the inequities of retroactive liability.

The current system has taken a terrible toll on many Superfund stakeholders, perhaps none more so than the small business community. They need relief. So do other segments of the business community along with cities and municipalities and the many others trapped in Superfund's liability web.

This bill's liability improvements will begin to bring relief by lowering transaction costs and thus enhancing the pace of cleanups.

I recognize that this bill's liability reforms do not please everyone. Insurers have been outspoken critics of any plan that does not fully repeal retroactive liability. Let me say to my friends in the insurance industry that they can achieve their goal, a goal that I share, by contributing to the solution. Full retroactive liability repeal requires full funding. The solution is in their hands.

Mr. Chairman, this bill continues to call upon business and industry to fund this program as under existing law. The costs will not shift to individual taxpayers. To the extent that some companies would get a partial reimbursement for future costs covering past actions that were legal at the time is fair.

I urge the committee that this provision be crafted in such a way so that it does the most good for the most parties, especially for those companies who stepped up to their cleanup obligations early in the process.

Mr. Chairman, I represent a company that did step up early and appreciate the provisions in the remedy selection that permit the reopening of selected records of decision.

Everyone involved in Superfund reform should be treated fairly and equally.

Mr. Chairman, Rohm and Haas and the chemical industry support your efforts and pledge to work with the committee to craft a bill that could be signed into law as soon as possible. Mr. Chairman, Rohm and Haas Company and others as well as CMA have recently sent letters to Speaker Gingrich, urging his support for the Superfund reform process underway in this committee.

I will be happy to answer any questions when that time is appropriate.

[The prepared statement of J. Lawrence Wilson follows:]

PREPARED STATEMENT OF J. LAWRENCE WILSON, CHAIRMAN AND CEO, ROHM AND HAAS CO., ON BEHALF OF THE CHEMICAL MANUFACTURERS ASSOCIATION

Good morning. My name is Larry Wilson. I am chairman and CEO of Rohm and Haas Company. I appreciate this opportunity to testify on behalf of CMA, the Chemical Manufacturers Association.

Mr. Chairman, Rohm and Haas and the chemical industry have been on the front lines of Superfund from the very beginning. Rohm and Haas was one of a very few businesses to support the original Superfund law when it was passed in 1980. Since then, Rohm and Haas has committed close to $200 million into the cleanup program, and the chemical industry has committed many billions more. These have not been sound investments.

We support the goals of Superfund, Mr. Chairman. But like virtually every other stakeholder, we are unhappy with the results. You are working to improve this law, and we appreciate the leadership you have provided. We fully support this committee's efforts to make comprehensive Superfund reform a reality in the very near future.

Mr. Chairman, as with all things related to this controversial program, your bill has been the subject of controversy.

Some say the bill's liability title goes too far—if offers too many concessions to PRP's.

Others say the bill does not go far enough—it falls short of full retroactive liability repeal.

Under the current circumstances, I say it strikes an appropriate balance. It faces facts. It offers as much reform as the current funding system can afford. It is, on balance, responsible legislation.

But whether or not we can agree on the specifics of liability reform, there is one thing we can *all* agree on: tax dollars raised for Superfund should be spent on cleaning up hazardous waste sites. Taxes raised for Superfund should not—and must not—be diverted to pay for other programs.

The decision by the Senate Finance Committee to extend the Superfund taxes in budget reconciliation will render this or any other comprehensive Superfund reform plan dead on arrival in this Congress.

Budget rules prohibit underfunded legislation. Stripping the current taxes away from the program will result in an underfunded Superfund bill. I urge this committee to do everything in its power to keep the Superfund taxes out of budget reconciliation. Save those tax dollars for their intended purpose—remediating contaminated sites.

I said earlier that this bill is responsible legislation. It offers as much liability reform as the current system can afford. I am among those who would prefer complete reform of the liability system, but only if it is adequately funded—and only if it means no slow down in the pace of cleanups. My industry, like this committee, cannot support any plan that results in more delay in cleanups and more uncertainty for businesses and communities alike.

At the same time, this bill is a dramatic improvement over the status quo. It scraps the joint and several standard and replaces it with a rational system for allocating responsibility.

The bill takes a real bite out of the inequities of retroactive liability, and untangles the knot at some of the most problematic waste sites around the country.

The current system has taken a terrible toll on many Superfund stakeholders, perhaps none more so than the small business community. They need relief. The bill dramatically improves the lot of larger businesses, cities and municipalities, and the many others trapped in Superfund's liability web. These liability improvements will drastically lower transaction costs and likely enhance the pace of environmental cleanup.

I recognize, however, that this bill does not please everyone. Insurers have been outspoken critics of any plan that does not fully repeal retroactive liability. Let me say to my friends in the insurance industry that they can achieve their goal—a goal that I share—by contributing to the solution. Full retroactive repeal requires full funding. The solution is in their hands.

This bill has also been criticized for allegedly shifting cleanup costs from polluters to taxpayers. Everyone in this room knows who pays for Superfund. Industries like mine pay for Superfund, and we pay a lot. In fact, we all pay so much that the fund has accumulated a surplus of more than $3 billion. That money should be spent on cleanups and not to offset the costs of other government programs.

This bill continues to call on business and industry to fund the program. To the extent that companies receive a partial reimbursement for their costs, it is money collected from those same companies.

The liability plan acknowledges the unfairness that has historically plagued Superfund. It credits those who acted lawfully. I urge the committee to ensure that this provision is crafted in a way so that it does the most good for the most parties. Everyone involved in Superfund knows first-hand how unfair the program has been. Everyone involved in Superfund should be treated fairly and equally by liability reform.

Mr. Chairman, I will be happy to answer any questions. I will close by repeating what I said earlier. This is a serious and responsible piece of legislation. It corrects many of the long-standing defects in the current program.

Superfund costs this nation more than $10 million a day, and provides very little in return. This bill goes a long way toward restoring and renewing this important program. Rohm and Haas and the Chemical Manufacturers Association support your efforts and pledge to work with this committee to perfect a bill that can be passed and signed into law as soon as possible.

Mr. OXLEY. Thank you, Mr. Wilson.

Next witness, Ms. McKee from NFIB.

STATEMENT OF KATHRYN McKEE

Ms. MCKEE. Good afternoon. My name is K.C. McKee, and I am a legislative representative for the National Federation of Independent Business. NFIB is the Nation's largest small business advocacy organization, representing more than 600,000 small business owners in all 50 States.

The typical NFIB member has 5 employees and grosses $250,000 in annual sales. Our membership reflects the general business profile in that we have the same representation of retail, service, man-

ufacturing, and construction businesses that make up the Nation's business community. NFIB sets its legislative positions and priorities based upon regular surveys of our membership.

I want to thank you, Mr. Chairman, for inviting NFIB to testify today. I commend you for dedicating this hearing to what small business owners across America view as the most critical element in Superfund reform, the liability structure.

No issue in this very complex public policy debate will have a more direct impact on the present and future economic viability of small businesses than this section. I would like to touch on three areas in my statement today: (1) small business and their attitude toward the Superfund; (2) what is small business's biggest concern under the program; and (3) what are the solutions that are out there, including your bill, Mr. Chairman, H.R. 2500.

Small business owners wear many hats. Two of the most important hats they wear are citizen in the community and business owner in the community. As citizens they live in the community, breathe the air, drink the water, and their children play in the area.

They want a healthy environment for both themselves and their children, but as business owners they expect that the Government will treat them fairly and responsibly when implementing environmental regulations. This has not been the case with Superfund. It has caused anger, distrust, and even despair among small business owners when they have to deal with Superfund, and who can blame them when pizza parlor owners are named as PRP's simply for throwing out their pizza boxes.

This leads me to my second point. What is small business's biggest concern under the program? No question it is the liability system.

Our members identify 3 major problems with the liability scheme.

First, Superfund encourages litigation. It is the nature of the statute. When one party gets named, it is in his best interest to drag in as many other parties as possible. This slows down the process and increases the cost and this is how the majority of our members end up in the process.

Second, there is no quick, easy or reasonable way for members who are minor contributors or even if you are an innocent party to get out of the Superfund liability. Nothing is gained either for the economy or environment when businesses are forced to close their doors due to lack of quick and reasonable settlements.

Third, what our members find most unbelievable and unfair is the retroactive and joint and several liability scheme, the fact that today they can be forced to pay 100 percent of the costs at a site when their actions were legal at the time is un-American and unfair.

Finally, I would like to touch on the solutions that are out there, including your bill, Mr. Chairman, H.R. 2500.

Our members believe that the best solution is to eliminate joint and several liability and retroactive liability. We commend Mr. Zeliff for his efforts and your efforts as well, Mr. Chairman, to achieve that. It is the best and fairest solution. However, we do understand that there are some funding concerns.

Mr. Chairman, your bill, H.R. 2500 contains many excellent reforms—eliminating liability at co-disposal sites and including a municipal solid waste exemption will help many NFIB members. Additionally, the elimination of liability for small or de minimis contributors is another very good element.

I would like to use the remainder of my time to make some constructive suggestions on how we think the bill could be improved.

First, we believe there should be a small business definition that is clear and concise throughout the bill. It should include an employee threshold and be consistent with the Small Business Definition Act.

Second, we like the ability to pay section but we think it should be clarified so that small businesses receive notification that this test is available. Many of our members have no idea that they might be able to apply for such a test.

Additionally, we think the EPA should be required to apply this test to all small businesses who request it.

We also believe the bill should include strong incentives to deter parties from bringing innocent or de minimis contributors into the allocation. We would suggest a cost shift requirement. If a party that is innocent or de minimis is brought into the process, they should have their legal fees and their share of the liability paid for by the party that drug them in.

Also, we believe that liability should be eliminated for recycling sites and facilities. These parties were obeying the law and should not be penalized.

Finally, we applaud the deadlines in the bill. However, deadlines tend to be missed and we would suggest strong incentives to encourage that these deadlines are met.

Mr. Chairman, although we would still like to work with you on broader retroactive repeal, these changes address most of our concerns and including them in H.R. 2500 would make this bill a product we would support.

Again thank you, and I would be glad to answer any questions.

[The prepared statement of Kathryn McKee follows:]

PREPARED STATEMENT OF KATHRYN MCKEE, LEGISLATIVE REPRESENTATIVE, NATIONAL FEDERATION OF INDEPENDENT BUSINESS

Good Morning. My name is K.C. McKee and I am a legislative representative for the National Federation of Independent Business (NFIB). The NFIB is the nation's largest small business advocacy organization, representing more than 600,000 small business owners in all fifty states. The typical NFIB member has five to eight employees and grosses $250,000 in annual sales. Our membership reflects the general business profile in that we have the same representation of retail, service, manufacturing, and construction businesses that make up the nation's business community. NFIB sets its legislative positions and priorities based upon regular surveys of its membership.

I want to thank you, Mr. Chairman, for inviting NFIB to testify before this subcommittee. I commend you for dedicating this hearing to what small business owners across America view as the most critical element in Superfund reform—the liability structure. No issue in this very complex public policy debate will have a more direct impact on the present and future economic viability of many small businesses than this section. Today, I would like to express our member's concerns with Superfund and comment on H.R. 2500, the Reform of Superfund Act.

SUPERFUND'S UNINTENDED EFFECTS

Superfund, as you know, was originally passed in 1980. At that time, it was believed that the number of hazardous waste disposal sites and the costs to clean

them up were relatively small and the process for identifying those responsible for clean up would be relatively simple. Unfortunately, that has not been the case. Over the past 15 years this program has proved to be one of, if not the worst, environmental programs on the books. It has failed to meet its mission of cleaning up hazardous waste sites and instead has encouraged wasteful, excessive litigation, litigation that last can for years and cost billions of dollars. Today's system is fraught with the wrong incentives: incentives to prolong clean up, incentives to continue expensive litigation, and incentives to drag even the smallest contributors through the lengthy process.

When examining the few sites that have been cleaned up, the costs associated with such cleanups, coupled with the staggering amount of money that has gone directly to lawyers' coffers, it is easy to see that the fault and liability system currently in Superfund is flawed. Congress may have envisioned a system that would only catch the few, large, intentional or irresponsible polluters, however, the reality has been very different. There has been over 100,000 different potentially responsible parties (PRPs) identified at Superfund sites. *Obviously, a majority of these are not Fortune 500 companies, but are small businesses.*

Since Congress last reauthorized Superfund, we have experienced an increasing number of complaints and questions from our membership. *The effect of the current liability system is permeating all segments of the small business community.* There isn't one segment whether it be a retail store, a professional service business, or a construction business that haz not been touched.

SMALL BUSINESS ATTITUDES

It is important to keep in mind the unique nature of a small business owner when you examine their reaction to environmental legislation. Small business owners wear many hats. Two of the most important are being both a business owner and a citizen of a community. They drink the water, breathe the air, and fish in the lakes. They want a healthy environment both for themselves and their children. They also expect the government to be fair and responsible. It is this lack of fairness and responsibility in the area of Superfund that is causing a groundswell of anger, distrust, and in many cases, despair.

We have all heard the horror stories such as the pizza parlor owner in New York who was named a PRP for throwing out her pizza boxes or the truck company owner who was named as a potentially responsible party and was not even in business during the operating life of the Superfund site. It was with the continuing emergence of these kinds of stories that NFIB began asking our members questions about Superfund in an effort to identify their specific concerns. Overwhelmingly, our membership indicated that the liability scheme in the current statue was the area they felt needed the most reform.

I would like to call your attention to a study undertaken by the American Council for Capital Formation (ACCF) in conjunction with the NFIB. This 1994 study surveyed small business PRP's and asked numerous questions about their experience with Superfund. *Approximately 70 percent of the 5,000 small PRP's surveyed indicated that the liability system was the major burden of Superfund. And most recently, at the White House Conference on Small Business, reform of Superfund's liability system was voted by the conference as the group's fifth highest priority.* Thus, our focus has been on the liability system and how to make it more equitable and efficient for the small business owner.

LIABILITY—SMALL BUSINESS CONCERNS

What are the small business problems with regard to liability? NFIB members have identified three major problems. *First, the nature of Superfund encourages litigation.* In most cases, our members are dragged into the process by being named as a PRP in a third party lawsuit. They are then forced to spend thousands of dollars and an excessive amount of their time defending themselves when they have done nothing wrong or illegal or have no records of to prove their innocence.

Second, they are forced to remain in the liability scheme when many times small businesses could and should be eliminated from the lengthy settlement process through deminimis settlements. These businesses contributed a minute amount of waste and it frankly is a waste of time and money to include them in the process. Nothing is gained—either for the economy or the environment—when businesses are forced to close their doors due to the lack of reasonable settlement offers. Unfortunately, the Environmental Protection Agency (EPA) has not placed an emphasis on offering such settlements. Most small business owners will tell you they receive very little cooperation in this regard from EPA. Many small businesses would qual-

ify for such settlements and, the fact that they are not encouraged or utilized increases the bottleneck in cleaning up sites.

Third, the retroactive strict and joint and several liability scheme is what our members find most unbelievable and unfair. The fact that they can today be held responsible for past actions that were legal at the time they were undertaken and could be forced to pay for 100 percent of the cleanup costs is un-American and outrageous. It forces our members to chose between two equally bad and unfair decisions: either pay for the cleanup even though you did nothing wrong or face years of litigation, huge legal fees, loss of credit and the threat of bankruptcy.

With the large number of small businesses already entwined in this web and with the increasing threat of thousands more in the future, NFIB's goal is to achieve meaningful reform in the Congress this year.

SUPERFUND REFORM PROPOSALS

There are many different ideas on how to reform Superfund circulating through the Congress ranging from total repeal of retroactive liability from 1987 to tax credits for cleaning up the sites. We believe that repealing retroactive liability is the best and the fairest solution. We recognize, however, that it is not the only way to fix this broken program.

Your bill, Mr. Chairman, H.R. 2500, serves as a valuable marker in forwarding the debate. It contains some excellent reforms and we appreciate the steps you have taken to eliminate some of the inequities and burdens placed on small business. Today, we will make some constructive suggestions to improve your bill for small business.

H.R. 2500 takes positive steps to reform the current liability system by eliminating the liability for those parties involved in co-disposal municipal landfill sites and those parties who contributed only municipal solid waste to a site. Many NFIB members will benefit from this reform.

Additionally, your bill makes strong improvements in the current program by including a 1 percent "de minimis exemption". As I stated earlier in my testimony, these minuscule contributors serve no purpose but to delay the process and hinder the ultimate goal of cleaning up our nation's most polluted sites. By eliminating these small contributors, you streamline the process and encourage those who contributed the large amount of waste to expeditiously work out a settlement and cleanup the sites.

SMALL BUSINESS IMPROVEMENTS TO H.R. 2500

These liability reforms move in the right direction; however, there are several areas that NFIB would like to see clarified or that we have concerns with.

While references are made throughout the bill to "small business" there are different definitions attributed to these references. We suggest that you include one definition that incorporates an employee threshold and is defined as a small business by the Small Business Act.

A very important provision in your bill is the "ability to pay test". While the bill mentions such a provision, the language is somewhat vague. A stronger definition that does not leave the burden on the small business owner to bring forward information and initiate the process would be preferable. Most small business owners are not aware that such a test is even available to them, much less that they have to initiate the process. We feel that a notification to small business parties should be an automatic requirement in which all small businesses are requested to provide all the relevant financial documents and then the burden should be on the government to determine small business' ability to pay.

Although your bill initially discourages parties from playing the blame game, there still exists the potential for parties to drag innocent or very minor small businesses into the allocation process. There should be an incentive that would make a third party think twice before trying to drag a business into the process when that business should not be there. We would suggest some sort of cost shift if a party is brought into the process and later found to be a de minimis contributor. The party responsible for bringing in the innocent or de minimis business would be liable for their attorneys' fees and liability allocation shares of the exempt business. This type of incentive not only produces a streamlined and expedited allocation process, it also results in less transaction costs and faster cleanups.

Along those lines we would also suggest eliminating liability for recycling sites such as oil and battery recycling or refining centers. The parties that sent their oil and batteries to these types of sites were not only following the direction of their local governments, they were attempting to improve the environment. They should not be penalized for acting responsibly.

Finally, we applaud the stated intention that EPA and the allocator meet certain time deadlines set forth in the allocation process. These deadlines, both for the commencement of the allocation process and for de minimis settlements, are a necessary ingredient in order to have a more expeditious and decisive process. We feel that such prompt determinations are an essential element if a reformed process is to succeed. To ensure that EPA and the allocator meet these imposed deadlines, we suggest that incentives be included.

CONCLUSION

Mr. Chairman, although we would still like to work with you on broader repeal of retroactive liability, we feel that these changes would address most of the concerns that our members have expressed, and if incorporated into H.R. 2500, it would be a product that we would support. These reform suggestions will dramatically reduce unnecessary litigation, ensure that money will go towards its intended purpose, and most importantly, ensure that sites will be cleaned up in a timely manner. We look forward to your response on these suggestions and thank you for this opportunity and for your interest in the small business concerns with Superfund. I would be glad to answer any questions you or the other members of the subcommittee may have.

Mr. OXLEY. Thank you, Ms. McKee.

Let me just state to the panel that because we have 6 panels today and we are only on our fourth one, we are going to stick very closely with the 5-minute rule in that regard so we will have enough time for questions for the panel. Mr. Condie.

STATEMENT OF BOYD G. CONDIE

Mr. CONDIE. Chairman Oxley and members of the subcommittee, good afternoon. I am a City Council member and former Mayor of the City of Alhambra, California, a community of about 85,000 people just east of Los Angeles.

I am pleased to be here today to testify on the local government liability provisions of H.R. 2500.

I am here representing American Communities for Cleanup Equity but I am also presenting this testimony on behalf of seven other national organizations listed on our statement. Collectively our organization represents thousands of cities, towns, counties and school boards across the United States. I ask that our complete statement be made a part of the record and I will offer some summary remarks.

Mr. OXLEY. Without objection, all of the statements will be made part of the record.

Mr. CONDIE. Thank you. Local governments have very serious problems. We have been saddled with millions of dollars of liability and legal costs simply because we owned or operated municipal landfills or sent garbage and sludge to landfills that were also used by generators and transporters of hazardous waste.

We know of over 640 local governments and 200 school districts that suffer from this problem.

For example, 29 California cities including my own city of Alhambra recently expended over $5 million in defense costs and assumed liabilities of over $34 million to settle litigation over the cleanup of the operating industry's land Superfund site in Monterey Park, California.

Over the years industrial generators had deposited over 200 million gallons of liquid hazardous waste on top of municipal solid waste. To pay these costs these cities have had to reduce police, fire

and public safety activities and personnel, cut library, parks and recreation budgets, and increase taxes and fees.

The cost that our citizens have had to bear as a result of these suits are unwarranted. Local governments are a unique situation and deserve relief.

First, waste collection and disposal is a government duty. It is a fiduciary responsibility we cannot ignore.

Second, the toxicity of municipal solid waste and sewage sludge is insignificant when compared to conventional hazardous waste.

For this reason we believe there is a strong consensus that local governments merit some relief and we are pleased that H.R. 2500 provides a comprehensive solution to this liability confronting local governments.

Under the bill no party would be liable for future costs or damage including the NPL sites where local governments had their municipal solid waste commingled with industrial hazardous waste.

In addition, the bill establishes a 10 percent cap on the aggregate liability of all generators, transporters and arrangers of municipal solid waste and sewage sludge. This will provide significant savings to local governments and substantially relieve their liability problems. The sites addressed by this proposal are intended to be the places where most local government activity with respect to municipal solid waste has been taken.

Consequently, they are the sites where most of the future liability, transaction costs, and uncertainties confront local governments.

At co-disposal sites the 10 percent cap will provide local governments with some relief from third party suits for the recovery of costs incurred before the date of introduction of the bill. Today hundreds of local governments are in the midst of this type of litigation. Tens of millions of dollars are at stake. For local government where $1 million or $2 million can mean the difference between solvency and a deficit, these costs are significant.

With respect to non-co-disposal sites currently on the NPL and sites that are added to the NPL in the future, a 10 percent cap will apply to future and incurred costs. This will be a great benefit to those local governments that may have put municipal solid waste or sewage sludge in a site not included in the co-disposal list.

However, the cap does not apply to local government owner/operators. Yet they operate their facilities as a public service and may where required by State law be required to accept commercial and industrial waste as well as residential waste. We are not sure how many local governments may be left without protection. However we are collecting this information and will provide it to the subcommittee.

The increased de minimis threshold and the retroactive liability discounts will also benefit local governments.

In conclusion, local governments hope that the subcommittee and Congress will move ahead quickly on Superfund reauthorization. We need and merit relief before we spend millions of additional dollars and are forced to continue more public services.

H.R. 2500 provides substantial and comprehensive relief to local governments and we recommend you, Mr. Chairman, for your leadership on this issue and look forward to working with the subcommittee as it moves through the process.

Thank you.

[The prepared statement of Boyd S. Condie follows:]

PREPARED STATEMENT OF BOYD G. CONDIE, CITY OF ALHAMBRA, CALIFORNIA

Chairman Oxley and members of the Subcommittee, American Communities for Cleanup Equity, the National Association of Counties, the National League of Cities, the U.S. Conference of Mayors, the Municipal Waste Management Association, the International City/County Management Association, the National Association of Towns and Townships and the National School Boards Association respectfully submit this testimony on the local government liability provisions of the H.R. 2500 for Superfund Reauthorization. Collectively, our organizations represent thousands of cities, towns, counties and school boards across the United States. We live and work closely with citizens who are impacted by hazardous waste sites. As a result, we are well qualified to provide the Subcommittee with a truly representative view of how local governments, school boards and their citizens have been affected by Superfund, and to offer some suggestions as to how the program may be improved.

We have been asked to testify on the liability provisions of H.R. 2500. Specifically, we will comment on how those provisions affect local governments, and suggest some changes that would improve the relief for local governments.

Local governments face a very serious and costly problem. Across America, unjustified litigation is saddling us with expensive legal costs and exposing us to millions and millions of dollars of unfounded liability simply because we owned or operated municipal landfills or sent garbage or sludge to landfills that were also used by generators and transporters of hazardous wastes as a means of inexpensive disposal. We know of over 640 local governments and over 200 school districts that have been named as defendants in lawsuits related to Superfund sites across the country.

This problem has seriously impacted local governments, school districts and ultimately taxpayers. For example, 29 California cities recently expended approximately $5 million in defense costs and assumed a liability of approximately $34 million to settle litigation over the clean up of the Operating Industries Superfund site in Monterey Park, California. Over the years, industrial generators had deposited 200 million gallons of liquid hazardous waste on top of the municipalities' garbage. To pay those costs, the cities had to reduce police, fire and public safety activities and personnel, cut library and parks and recreation budgets, and increase taxes and fees.

The costs and the sacrifices that our citizens have had to make as a result of these suits are unwarranted. Local governments are in a unique situation and justifiably warrant relief because of the nature of the waste in question and the nature of the services we provide.

Local governments have a fiduciary responsibility that we cannot ignore, we provide collection and waste disposal for our constituents as part of our governmental duties. This traditional function of cities, towns and counties continues to this day.

Secondly, the waste at issue is ordinary municipal garbage and trash and sewage sludge. The toxicity of municipal solid waste and sewage sludge is significantly lower than conventional hazardous waste. Repeatedly, in study after study, municipal solid waste has been found to contain less than one-half of one percent (.5%) toxic materials. With very few exceptions, every municipal landfill on the Superfund list is actually a co-disposal site where industrial hazardous waste has contaminated the municipal waste.

For these reasons, we believe there is a strong consensus that local governments merit some relief from Superfund liability for their municipal solid waste and sewage sludge. We are very pleased that H.R. 2500 recognizes this and we believe that it provides a comprehensive solution to the liability problems confronting local governments. In addition, other parties such as small businesses, civic organizations, nonprofits, and other generators and transporters of municipal solid waste will benefit.

As we understand the bill, at the National Priority List (NPL) sites where local governments had their municipal solid waste co-mingled with industrial hazardous waste, no party will be liable for costs or damages incurred after the date of introduction of the bill. In addition, the bill establishes a 10% cap on the aggregate liability of all generators, transporters and arrangers of municipal solid waste and sewage sludge for costs or damages incurred prior to the date of introduction of the bill that are, or may be, subject to contribution actions.

If enacted this will provide significant savings to local governments. The sites addressed by this proposal are the places where most local government activity with respect to municipal solid waste and sewage sludge has taken place. Consequently,

they are the sites where most of the future liability, transaction costs and uncertainties confronting local governments are located. Therefore, elimination of future liability at these sites will substantially relieve the liability problems confronting local governments.

Moreover, by including a 10% cap on the aggregate liability of all generators, transporters and arrangers of municipal solid waste and sewage sludge, the bill provides local governments with some relief from third party suits for the recovery of costs incurred at the co-disposal sites before the date of introduction of the bill. Today hundreds of local governments are currently in the midst of this type of litigation. Many more are likely to be in a similar situation in the future. Tens of millions of dollars are at stake, and governments are spending millions in legal fees to protect themselves. For governments where $1 and $2 million can mean the difference between solvency and a deficit, these costs represent a significant burden. Capping this liability is a significant element of this proposal and has our full support.

H.R. 2500 does not reopen settlements that have taken place, or payments that have already been made. It provides relief only for local governments that are currently involved in actions, or may be the subject of future contribution suits, for the recovery of costs incurred prior to the date of introduction. It is consistent with the intent to provide greater certainty and significantly reduce transaction costs for local governments. It is also consistent from a policy perspective, since the nature of the waste and the nature of the service provided by local governments is the same, regardless of the dates of when costs were incurred or litigation was initiated.

In addition, small businesses, civic organizations and schools typically sent most of their municipal solid waste to these co-disposal sites. They will also benefit from the same relief afforded to local governments. Finally, these are the sites with the largest number of parties and the highest transaction costs. These provisions will go a long way toward the reduction of private transaction costs associated with Superfund liability.

With respect to non-co-disposal sites currently on the NPL, and sites that are added to the NPL in the future, the bill also provides for a 10% cap on the aggregate liability of all generators, transporters and arrangers of municipal solid waste and sewage sludge. These will be of great benefit to those local governments that may have put municipal solid waste or sewage sludge in a site not included in the co-disposal list.

Further, we applaud the provision eliminating liability for parties that sent waste to a facility before January 1, 1987 and contributed less than 1% by volume, of materials containing hazardous substances. In addition, all parties will receive a 50% reduction in liability related to costs incurred after the date of introduction of the bill that are attributable to activities at a site prior to January 1, 1987.

For these reasons, H.R. 2500 provides substantial and comprehensive relief to local governments. We commend you, Mr. Chairman, for your leadership on the relief that you have given to local governments in the liability provisions of this bill.

However, not all local governments involved in Superfund will benefit from these provisions. The 10% cap does not apply to local government owner/operators. Apparently, they will not share in the relief applicable to costs incurred at the co-disposal sites before the date of introduction of the bill, nor will they have any cap on their liability if they owned or operated a site not included on the municipal co-disposal list. As noted earlier, local governments operated facilities as a public service, not as a profit making enterprise. Many were required by state law to accept commercial and industrial waste as well as residential waste. Private entities who sent hazardous materials to such facilities often benefited from disposal rates that were cheaper than those charged at private facilities. However, we are not sure how many local governments may be left without protection. We are collecting this information and will provide it to the Subcommittee to ensure that these parties are adequately protected.

In conclusion, local governments are anxious that Superfund be reauthorized as quickly as possible. We merit relief from the current liability program. Financially, our citizens and communities desperately need such relief before we spend millions of more dollars and are forced to curtail more public services as a result. Every day counts. H.R. 2500 provides many local governments with liability relief. We hope the Subcommittee and Congress will move ahead quickly on Superfund reauthorization, and local governments look forward to working with you as the process moves forward.

Mr. OXLEY. Thank you, Mr. Condie.

Dr. Bowman.

STATEMENT OF CHARLES H. BOWMAN

Mr. BOWMAN. Thank you very much, Mr. Chairman, and of course it was a great privilege to be introduced today by my own Member of Congress.

As Mr. Brown indicated, I am the Chairman and Chief Executive Officer of BP America, Inc.

The BP Group, our parent, is the world's third largest oil company and we in America are the largest producer of crude oil in the United States. We also operate 4 refineries, 2 chemical plants and some 7,500 branded retail service stations in 30 States, in addition to which we are the largest oil field operator on the north slope of Alaska and a participant in the offshore Gulf of Mexico.

I come before the committee today with one simple objective, which is to encourage this committee and the Congress as a whole to move forward this session with the reform of the Superfund program. Disputes over how to fix the liability schemes should not be allowed to stop progression on the programmatic reforms badly needed in this program.

Each year this program continues without reform, site cleanups, which are everyone's priority, are delayed. Taxpayer and private sector funds in the millions are wasted on transaction costs. I think Congress has a unique opportunity to address these problems and expedite the cleanup of our environment.

I was asked to testify today on the liability scheme and I'll do so, but Mr. Chairman, I have a list of program changes which we have submitted for the record and which your bill currently implements and my company supports. It is the importance of these changes that has led us to the sense of urgency in testifying in support of this bill. It would be a shame for the comprehensive reform package to die due to any dispute over retroactive liability repeal.

When my company is identified as a potentially responsible party under the Superfund program as it currently exists, our corporate philosophy is to proactively respond to both the Federal and State agencies, as relevant.

We believe "the polluter pays" principle is an equitable way to access responsibility. We today are actively involved in remediating over 20 sites and we currently pay an average of about $41 million a year in Superfund taxes.

Our experience to date with the Superfund program though has been very frustrating. We found the program to have a liability process which is cumbersome and litigious. It contains a remediation process and enormous documentation burdens, both of which are excessive in costs and both of which appear to be totally independent of the environmental risk involved.

Regarding the liability reauthorization question, I understand there are basically 3 options being discussed by various Superfund stakeholders.

The first calls for an end to the Superfund tax mechanisms unless the program is reformed. We just don't see this as a viable alternative. The effect of repealing the tax would end all funding and that is just not what is acceptable in our judgment to the American people.

The second option has received the most attention and it is based on repeal of retroactive liability and this is real easy to understand.

This approach proposes that if a company disposed of a waste in accordance with the rules of the day then the Federal funds should pay for the cleanup. Sounds very fair but when we look at it more closely we have some concerns.

There are problems of fairness associated with such a repeal as well. If the provisions repealing retroactive liability were passed and not made retroactive, then good faith stakeholders who have stepped forward in the past would be punished.

Another significant concern is whether there is enough money available to fund the full repeal of retroactive liability and we are very skeptical of the argument that there are sufficient cost savings associated with other program changes to adequately fund full repeal.

That said, we oppose increasing the current tax burden on the petroleum sector to fund full repeal.

The third option is the one proposed by your bill today. The bill proposes partial repeal. BP views it as the middle ground and we support the proposal.

This bill recognizes what is broken in the current program and seeks to make many valuable reforms. The proposed legislation strikes a balance between the current revenue stream with the liability it seeks to grant. We think these changes will focus on the Superfund program on cleaning up the environment, which after all is the object.

So to close, Mr. Chairman, let me re-emphasize that Superfund is in need of change. We have struggled for 15 years attempting to implement a program with a myriad of problems.

Ladies and gentlemen, let's don't let this effort die. Thank you very much for the opportunity to be here today.

[The prepared statement of Charles H. Bowman follows:]

PREPARED STATEMENT OF CHARLES H. BOWMAN, CHAIRMAN AND CHIEF EXECUTIVE OFFICER, BP AMERICA, INC.

Chairman Oxley and Members of the Committee, I am Charles Bowman, Chairman and Chief Executive Officer of BP America, Inc. The BP Group is the world's third largest oil company and is the largest producer of crude oil in the United States. BP America operates four refineries, two chemical plants, a network of over 7,500 branded retail service stations in 30 states in addition to being the largest operator on the North Slope of Alaska and a participant in the Gulf of Mexico.

I come before you today with one simple objective. I encourage the Members of the Committee and the Congress as a whole to move forward this session with a reform of the Superfund program. Disputes over how to fix the liability schemes should not be allowed to stop progress on the programmatic reforms badly needed in the Superfund program.

Each year this program continues without reform, site cleanups, which are everyone's priority, are delayed. Taxpayer and private sector funds in the millions of dollars are wasted on transaction costs. Congress has an opportunity to address these problems and expedite clean up of our environment.

I was asked to testify today on Superfund's liability scheme and I will do so. But Mr. Chairman, I have a list of program changes, which I would like to submit for the record which your bill currently implements and my company supports. It is the importance of these changes that has led my company to the sense of urgency of testifying in support of your bill. It would be a shame for this comprehensive reform package to die due to a dispute over retroactive liability repeal.

When BP is identified as a potentially responsible party under the Superfund program, our corporate philosophy is to proactively respond to both Federal and State agencies. We believe the "polluter pays" principle is an equitable way to assess responsibility. We are actively involved in remediating over 20 sites and we currently pay an average of over 40 million dollars a year in Superfund taxes.

Our experience to date with the Superfund program has been frustrating. We have found the program to have a liability process which is cumbersome and litigious. It contains a romediation process and enormous documentation burdens both of which are excessive in costs and independent of environmental risk.

Regarding the liability/reauthorization question, I understand there are basically three options being discussed by various Superfund stakeholders.

The first proposal calls for the end of the Superfund tax mechanisms unless the program is reformed.

BP does not see this as a viable alternative. The effect of repealing the tax would end all funding of the current program and essentially terminate all cleanups, which we don't believe is acceptable to the American people.

The second option has received the most attention and is based on the repeal of retroactive liability.

It is an easy option to understand. This approach proposes that if a company disposed of a waste in accordance with the rules of the day, then the Federal fund should pay for the clean up. Sounds eminently fair. However, when we look at it closely we have serious concerns.

There are problems of fairness associated with such a repeal. If the provisions repealing retroactive liability were passed and - pardon me - not made retroactive, then "good faith" stakeholders who have stepped forward would be economically punished.

Another significant concern is whether enough money is available to fund the full repeal of retroactive liability. BP is skeptical of the argument that there are sufficient cost savings associated with other program changes to adequately fund full repeal of retroactive liability. BP steadfastly opposes increasing the tax burden on the petroleum sector to fund full repeal.

The third option is the one proposed by Chairman Oxley today. The bill proposes partial repeal. BP views it as the middle ground of the three options. We support Chairman Oxley's proposal. The bill recognizes what's broken with the current program and seeks to make many valuable reforms. The proposed legislation strikes a balance between the current revenue stream with the liability relief it seeks to grant. We believe these changes will focus the Superfund program on cleaning up the environment, which is everyone's priority.

In closing, let me reemphasize that Superfund is in need of change. We have struggled for fifteen years attempting to implement a program with a myriad of problems. Ladies and gentlemen, don't let this effort die. Thank you for allowing us the opportunity to be with you today. I look forward to answering any of your questions.

Mr. OXLEY. Thank you, Dr. Bowman, and let me just say that BP has been a long-time corporate citizen of our district and has an excellent reputation and we are glad to have you here.

Mr. BOWMAN. Thank you.

Mr. OXLEY. Mr. Burt.

STATEMENT OF ROBERT N. BURT

Mr. BURT. Thank you, Mr. Chairman. My name is Bob Burt. I'm the Chairman and CEO of FMC Corporation, headquartered in Chicago and I come here as a representative of the Business Roundtable, an organization of which the CEO's of 200 of the largest companies in America are members.

I would like to start my testimony by thanking the chairman and all members of the committee for the effort that they have put into trying to change this bill. It is probably the most ineffective bill ever passed by Congress or at least the one that I have come across and it is not one that has a lot of political or voter appeal. As a matter of fact, there's probably a lot of downside, so I appreciate your courage and perseverance in reforming this bill, and it's worth it because it is costing government and private industry in my opinion and an opinion based upon a lot of analysis roughly $2 billion a year, one-half on litigation and one-half driven by unnecessarily strict remedy reforms.

Remedy reforms are fundamental to our strong support and we strongly support the remedy selection of your bill. But this is a liability hearing. We believe H.R. 2500 is a major step forward in seeking to direct Superfund dollars to cleanup. Testimony tends to focus on the hole in the doughnut, not the doughnut and mine to some extent is no exception, but before we get to the hole, let's talk about the doughnut, that is, all that is right about this bill, because it far outweighs the changes that we would like to see: repeal of joint and several, assurance that taxes collected for Superfund will be used for cleanup and other related expenses, not EPA general expense, other government programs or budget deficit reduction.

Our support is premised on the assumption that the taxes will continue, that the funds will come out off the taxes, which will be roughly $1.5, $1.6 billion, and the continuing appropriation of the $250–300 million in general funds, that is, the polluter is paying because those taxes come from polluters.

We also like the elimination of retroactivity at co-disposal sites, a scene which caused a lot of litigation. There are no new taxes. Retroactivity relief goes as far as it can under existing funding, 50 percent de minimis relief, but most important, the bill ensures that whatever program enacted has a stable base of funding, or to quote a well-known legislator, which until recently I thought was the chairman, "don't jump into a half-filled swimming pool."

Turning to problems that we have with H.R. 2500, if retroactive is unfair, it should be repealed. In the past $2.2 billion has been earmarked for Superfund and $1.5 billion have been spent—that is, funds earmarked for Superfund have gone to general programs. I suppose in the terms of Mr. Markey, those have gone to help widows and orphans.

So past funds in terms of what they have been collected have in fact gone to help the general payor even though they were specifically collected for Superfund purposes.

We have to work within the framework of available funds but I would urge you to continue to explore alternatives which we will continue to work with you and your staff on so that we can afford repeal, total repeal of retroactivity.

A few other points. The orphan's share does not have any funding for it and therefore it in effect maintains joint and several liability. We have been involved in sites where we were the only person even though we had a de minimis under this definition contribution to the site where we still had to pick up the total share, because nobody else—and it would continue under this bill because nobody else was de minimis.

So I think unless there is a funding for orphan's share, that will continue to drive litigation.

We are also concerned about the enforceability of reimbursement, which the bill does not really have a mechanism for. We would be concerned about being reimbursed and having to get those funds if we had to go through the authorization and appropriation process with Congress every year.

Turning back to the positive side and concluding my testimony, H.R. 2500 can play an important role in speeding up cleanup. We have done a lot of analytical modelling work and what that means, and let me give you our conclusions.

Over the last 5 years EPA has cleaned up 280 sites. We believe that under this bill we would clean up 574 sites in the next 5 years and the program would be over by 2010.

I would say again that remedy reforms are the fundamental driver and again let me thank you for your efforts. H.R. 2500 is a tremendous step forward in terms of Superfund reform. Thank you.

[The prepared statement of Robert N. Burt follows:]

PREPARED STATEMENT OF ROBERT N. BURT, CHAIRMAN AND CHIEF EXECUTIVE OFFICER, FMC CORPORATION, ON BEHALF OF THE BUSINESS ROUNDTABLE

The Business Roundtable[1] appreciates the opportunity to comment on H.R. 2500, "The Reform of Superfund Act of 1995" (ROSA). Introduction of this legislation is an important step toward passage of comprehensive reform of this badly flawed law in this Congress. We look forward to working with you and members of the Subcommittee as the reform effort moves forward.

Members of The Roundtable are committed to reforms which are consistent with *The Business Roundtable Superfund Principles for Reform.* We are pleased that serious legislative effort is now underway and we look forward to being an active participant. It is important that we return Superfund to its important goal of protecting human health and the environment by allowing for quick and effective response to the risks associated with waste disposal.

First, we would like to comment on the funding issues raised by H.R. 2500. Reforming the present system of joint and several, and retroactive liability is challenging. The current budget reform climate compounds this challenge by potentially limiting the dollars available for this program in future years.

At the same time, there are sites that need to be addressed and for which federal funding will be required. One of The Roundtable's Superfund principles for Reform is that program funding "be stable and at levels adequate to provide rapid response to immediate public health and environmental threats, and to provide effective long term protection." We appreciate your leadership in seeking a reformed program that meets this goal of addressing sites responsibly within finite budget resources.

We believe that the Superfund program must be disciplined by imposing an annual budget which directs program income toward actual removals, remediation, and restoration or replacement of natural resources with the absolute minimum of administrative costs and an accounting of costs. H.R. 2500 also seeks to achieve this principle by directing the moneys raised in Superfund taxes to cleanup and other related purposes.

As you are well aware, the principle of using Superfund revenues for Superfund cleanup has not been consistently applied over the life of this program. The current Superfund taxes on crude oil and chemical feedstocks, as well as the general environmental industry tax, currently raise approximately $1.5 billion annually. Since the first year the Superfund taxes were in effect (1981), business has paid some $12.5 billion in taxes to fund the Superfund program. During that same period approximately $2.5 billion in General Revenue has been appropriated to the Superfund program.

Yet not all of the tax revenues raised by the Superfund are dedicated to Superfund cleanup, or even Superfund related activity. In recent years, the Superfund Trust Fund has accumulated a surplus which is projected to grow to almost $3.5 billion by the end of fiscal year 1996. Moneys collected from the business community for Superfund purposes have been scored repeatedly against deficit reduction, or against other non-Superfund related programs.

We believe the designation of industry tax and cleanup dollars for other purposes should not continue. As you are aware, the Senate version of Budget Reconciliation threatens to take this disturbing trend to the extreme. It would allow reauthorized Superfund taxes to offset other programs in the budget, thereby making all these revenues unavailable for scoring against future programmatic changes to Superfund. We are unalterably opposed to this practice continuing. Your bill commendably seeks to stop this, and we support the attempts in ROSA to direct any future revenues strictly for Superfund purposes, principally cleanup.

As the Superfund reform process moves forward, we would recommend greater emphasis be placed upon developing a coordinated mechanism to ensure that pro-

[1] The Business Roundtable is an association of more than 200 chief executives of leading U.S. corporations, representing over 10 million employees who examine public issues that affect the economy and develop positions which seek to reflect sound economic and social principles.

gram, tax, appropriations and budget policies work together to further the purposes of the reforms in ROSA. Specifically in H.R. 2500, language might be considered which would specify the levels of spending for each of the ten Superfund related activities proposed in the bill. In addition, because of the recent accrual of surplus in the Superfund Trust Fund, we would recommend that the cap on any unobligated balance in the Fund be moved forward (advanced in date) in order that it more appropriately trigger a cutoff in the taxes should an excessive balance develop.

Now, turning to the specific liability reforms proposed in H.R. 2500, we share with you, Mr. Chairman, the goal of full repeal of both joint and several and retroactive liability. We are heartened that efforts continue to develop an approach to Superfund funding that would allow for even greater liability reform. However, as introduced, ROSA is consistent with The Roundtable's Principles in several important aspects:

- It eliminates the current system of joint and several liability at all sites.
- It eliminates retroactive liability at some 250 codisposal sites; sites with the greatest potential for protracted litigation.
- It allows for continued participation by the private sector in cleanup at most sites, which we believe will improve the efficiency of cleanups and thus reduce the demand on the Fund.
- It funds reforms without raising existing taxes or creating new taxes.
- It provides relief for fully half of retroactive liability for all parties at sites other than codisposal sites.
- It provides liability relief for those with *de minimis* shares of responsibility.

ROSA's approach to liability reform is one which is consistent with the current budget realities as understood. It frees thousands of cities, states, small businesses, and others from much, if not all liability. And it does so within the budget confined to Superfund taxes at their current levels and a general revenue contribution at its historic level. We believe this signals progress toward using Superfund revenues more efficiently and fairly.

Additional progress toward repeal of retroactive liability remains desirable. And we continue in The Roundtable to seek alternatives which can maximize to an even greater extent the level of reform, while maintaining two important principles; that funding is both adequate and stable, and that the pace of cleanup be sustained. We would identify the following as areas where improvements to the current provisions in the bill could be made:

- If the Committee adopts the percentage reimbursement proposal, the enforceability mechanism needs to be addressed, making sure those who agree to the allocation actually realize the 50% reimbursement for their pre-1987 share of liability within a reasonable time frame will serve as an important incentive to ensure faster, more efficient cleanups.
- The absence of orphan funding seems at odds with the concept of an allocation system that seeks to fairly allocate real responsibility. At some sites, the orphan share may be well in excess of 50% of the liability of currently viable parties.
- We would urge consideration that the category of those sites where retroactive liability is repealed should be expanded to include the greatest number possible within the budget available. If the principle of retroactive liability is wrong as the bill acknowledges, then it needs to be redressed as fairly as possible.

We appreciate your willingness and that of Subcommittee staff to continue to work within the parameters of a $1.8 billion budget to see how additional reforms might be achieved. As you know, our programmatic computer model of the reforms in H.R. 2500 suggest that they can be successfully implemented and allow for the program to improve substantially (by some 50%) over its historic pace. It suggests that in the out years the demand for tax dollars also substantially diminishes, presenting the opportunity to reduce taxes or expand relief from the unfair liability system. Our analysis further indicates the program can end within a reasonable period of time (2010) adding sites to the NPL in the manner proposed in H.R. 2500.

The Roundtable continues to work within a range of reasonable assumptions to see whether other additional liability reforms are affordable within the current level of funds available and achieve a similar pace of completions. We believe, however, that any approach that results in less than full repeal of joint and several and retroactive liability should be done in a manner that does not disadvantage any one sector.

Mr. Chairman, throughout our modeling of the Superfund program, it has been clear that remedy selection reforms, under almost any liability reform scenario, will be the primary driver in improving program pace. Thus liability reform cannot be

addressed independent of making the sort of substantial reforms to remedy selection H.R. 2500 proposes.

The remedy reforms in H.R. 2500 are consistent with The Roundtable's principles including their emphasis upon site specific risk assessment, the use of cost-effectiveness as a primary rather than secondary criteria in remedy selection, and factoring the actual or reasonably anticipated uses of land and water resources. We are prepared to participate in discussions to improve understanding and acceptance for the concepts in Title I, again emphasizing the incentive they provide to getting on with the job of cleanup.

The effort made in Title IV of the bill to address liability for and restoration of natural resource damages is a significant step toward disciplining a program which could equal the existing response program. The elimination of non-use damages is a step that The Roundtable supports.

The Roundtable commends your effort to clarify the language in the underlying statute to limit NRD liability to $50 million per site. We recommend this language be tightened to preclude Trustees from apportioning affected areas and thus achieving multiple recoveries. The Roundtable also recommends that lost-use damages be eliminated in the same way that non-use damages are precluded by the bill.

The Roundtable recognizes that on the larger issue of pre-1980 liability for NRD, the Committee may be constrained. However, The Roundtable strongly recommends that to the extent liability for cleanup actions is limited, language should be added to ensure that unnecessary remediation efforts are not continued or initiated under the natural resource damage provisions of the Act.

Mr. Chairman, The Roundtable is an organization representing a diverse cross section of American business. Reforming Superfund stands as one of our most important priorities and we appreciate your leadership in making it one for this Congress. We look forward to working with you and the other members of the subcommittee on this legislation so that we can begin to realize the goal of making this program accomplish its goal. Thank you for your consideration of our comments.

Mr. OXLEY. Thank you, Mr. Burt, and thank you for your continuing efforts on the bill's behalf, going back to the 103d Congress. Your efforts are very much appreciated.

Mr. Baker.

STATEMENT OF GEORGE D. BAKER

Mr. BAKER. Thank you, Mr. Chairman. Good evening.

Mr. OXLEY. You should be around for the sixth panel.

Mr. BAKER. When will drinks be served?

Mr. Chairman, thank you so much. My name is George Baker. I have the privilege of serving as the Executive Director of Superfund Reform '95, which clearly is the broadest based coalition testifying here today.

Superfund Reform '95 has well over 1,200 members representing hundreds of thousands of small businesses, 300 municipalities, 330 local chambers of commerce, trade associations, insurers, environmental professionals and concerned citizens who have banded together for one purpose, one purpose alone—comprehensive, integrated, structural reform of the horribly broken and wasteful Superfund program in 1995.

After months of enormous work in February 95, our Coalition first published our "principles of Superfund reform," a blueprint for comprehensive, integrated reform that has led the public debate over what constitutes true reform. Indeed, your own proposal issued last July paralleled our suggestions very closely, especially with your call for elimination of retroactive liability prior to 1987.

That was then and this is now. Now we are discussing your bill, H.R. 2500, a legislative proposal which in so many ways adopts the recommendations we originally made to you, for example in the areas of remedy, natural resource damages, devolution of authori-

ties to the State, the RCRA interface with Superfund and voluntary programs.

We generally are cheered by these non-liability provisions of H.R. 2500 and we openly applaud you for keeping them in your bill. But let's be crystal clear on the key issue of this hearing today.

H.R. 2500 does not yet get the reform right on the liability issue which we believe is the heart and soul of what true reform is all about. If you don't reform the liability regime, you haven't done much for so many of the victims unfairly trapped in the Superfund nightmare.

You don't get the lawyers out of the system. You don't cut the wasted $1 billion a year in transaction costs. You don't get the small and the medium-sized businesses out of the system. You don't relieve the municipalities of the crippling burden to their local economies from their own direct liability or that of their resident businesses on Main Street.

You don't streamline the bloated, wasteful, entrenched bureaucracy. Most important however, you will not accelerate the pace and volume of cleanup.

I give you credit for one thing. H.R. 2500 does exactly the right thing with regard to liability at municipal co-disposal sites. You eliminate the retroactive liability. To that we say a very hearty bravo, exactly the right way to go.

But for the rest of the sites, the multiparty sites as well as the single party sites, the bill retreats to essentially the same proportional liability system as last year's administration bill. This allocation system drags more parties into the process sooner, a process where so many small businesses lack the records of their past disposal practices to the point that they will be rendered unable to defend themselves, and we believe it will be as costly for those people, if not more so, than the existing system.

Battles over proportional shares, that is to say the battles over money and who pays for it, will continue to dominate this allocation regime.

Now we are still struggling with the details of the bill like everybody else and it's been a very good discussion of what is in the bill today as we all evolve towards knowing more, but what we did, we took the liberty of putting this together.

What this is basically—we tried to be as literal as possible about how the bill proceeds in the allocation system and what you see, if my staff would just stand there for a second, please—as you proceed through this process, just to this point where, right here, where her hand is, it is already almost 1½ years in the process of picking PRP's, getting everybody in the pool. As we proceed through the process, there is more and more process for getting exempt, special status parties out for expedited reviews, for all kinds of opportunities before you even get to the allocation.

Each bullet, the red bullets we have got there is a point in the process where the lawyers, the consultants, the transactional artists who are taking advantage of this system today, play the game. That means small parties, everybody has to be represented in that respect.

Only when you get all the way over to the other poster, here, Mr. Chairman, and that is at the bottom of that poster, is where you

start talking about remedy and really cleaning up the site. That is probably in our best estimates conservatively 3 years down the road.

Our point in bringing this up is simply this. Our system, where you remove the retroactive liability, avoids 95 percent of everything you see—all the points, the bullet points, where the lawyers are, forget it. Not in the process anymore.

What we do is we go directly to "GO"—directly to where the remedy is talked about and that is why we think your focus and your continuing interest in getting to the full reform is so important.

It was you, Mr. Chairman, who said if we recognize Superfund after we have finished our work we will have failed. Well, why you have not failed with regard to the non-liability titles, we recognized far too much of the existing Superfund and its wasteful battles over money in H.R. 2500's liability section.

[The prepared statement and charts of George D. Baker follow. The reports entitled: "The Costs of Superfund and Proposed Reforms," and "Estimates of Costs Under the Superfund Reform '95 Proposal are retained in the committee files.]

PREPARED STATEMENT OF GEORGE D. BAKER, EXECUTIVE DIRECTOR, SUPERFUND REFORM '95

My name is George D. Baker. I am the Executive Director of Superfund Reform '95, a coalition of over 1200 small and large businesses, trade associations, environmental professionals, insurance companies, municipalities, chambers of commerce, and concerned citizens, all of whom are dedicated to comprehensive reform of the Superfund law in 1995. On behalf of this very diversified coalition, let me take this opportunity to thank the Chairman and the Members of the Subcommittee for inviting Superfund Reform '95 to participate in today's hearing.

Superfund Reform '95 has been instrumental in bringing to the forefront the urgent need for fundamental, comprehensive reform of CERCLA. Our Principles For Superfund Reform, published in April 1995, provides a blueprint for real reform, including:

- Full repeal of retroactive liability prior to 1987.
- Giving qualified states the opportunity to be delegated authority and funding to manage NPL sites.
- Reforming the remedy selection process so that human health risk ranges are used as goals to guide remedy selection.
- Capping the NPL so that the federal Superfund program is phased out as NPL sites are cleaned up.

Many SR '95 members, representing both the small business community as well as local governments, have met with you or your staff over the past three months to share their personal, and often harrowing experiences with the EPA under the current Superfund program. As a result of these meetings, I am not over-dramatizing when I say that the adverse effects that Superfund can have on businesses, on local communities and, in many cases, on an individual's personal health and well-being can be devastating. These representatives from outside the Beltway have all done their jobs well, and the proof of just how well is evidenced by the fact that the consensus both here in the House as well as in the Senate is that the current Superfund program is broken and needs fixing. Moreover, it is widely recognized that to merely put a "band-aid" on the program will not serve to cure the ills that have plagued so many of your constituents over the past 15 years.

H.R. 2500 reforms many issues identified by SR '95 in our "Principles For Superfund Reform" paper. In particular, H.R. 2500 makes major progress in the areas of remedy reform, natural resource damages, and voluntary programs, in a manner which positively responds relative to both our SR '95 principles and to the principles espoused by Chairman Oxley back in July. Though H.R. 2500 has not yet reached the same level of needed progress in the area of liability reform, we remain encouraged by the Chairman's statement that he wants to continue to work toward full repeal of retroactive liability. Perhaps more so than any other group, SR '95 has accepted the Chairman's challenge to work with the full Committee to devise a

means to satisfy the funding issues so Congress can get to full retroactive liability repeal, and thus true comprehensive reform, in 1995.

Many have asked why we remain committed to full repeal of retroactive liability prior to 1987. The reasons for this type of reform are quite evident. In short, without full repeal prior to 1987, the program will continue to be bogged down in litigation and transaction costs, effectively preventing sites from being cleaned up. More specifically, unless we remove retroactive liability from this program:

- The focus will remain on liability/financing, rather than cleanup, at those sites on the NPL where a proportional allocation system is established.
- More parties will be brought into the allocation process much earlier, causing transaction costs to increase at the relevant sites. Battles over allocating will dominate the process, and any post-allocation transaction costs savings by PRPs will probably be offset by the increased Government transaction costs of running the system.
- Cleanups will not be done any faster, except at those sites where retroactive liability is repealed, namely the 250 or so municipal landfills. At the remaining sites, the new allocation system will start the litigation process sooner as more parties get dragged into the system earlier to determine percentage shares of cleanup costs.
- The "fair share" system proposed in H.R. 2500 will result in a pattern of cost-shifting that is anything but fair. Because record-keeping requirements applied to most larger PRPs in 1980, these large PRPs will have a big advantage over smaller parties, who will often be defenseless in the allocation system. Without records it is difficult to envision how an allocator can rationally determine the allocation of a party's share or whether a small party qualifies for *de minimis* treatment.
- Involvement in the program will certainly end for some exempted small businesses. Any party that contributed 1% or less of the total volume of waste at a site will eventually be exempted, but not before large amounts of money have been spent to prove shares of total volume. And until such proof is accepted, relationships with banks and lines of credit will continue to be jeopardized. Municipalities will continue to remain liable at other non-exempted sites. Those municipalities responsible for industrial activities and tort liability for regulatory operations (i.e., directing parties to dispose of waste at certain facilities) will remain liable and forced to participate in the allocation system. The "retroactive liability discount" for parties who agree to shares in the allocation process and perform the cleanups does not become available until the end of the process—after a small business has had to expend relatively large and unaffordable sums to navigate the fact-intensive allocation process.
- Municipalities will continue to remain liable at other non-exempted sites. Those municipalities responsible for industrial activities and tort liability for regulatory operations (i.e., directing parties to dispose of waste at certain facilities) will remain liable and be forced to participate in the allocation system.

Much has been said with regard to a perceived "funding gap." Let me make our position very clear on this point: *SR '95's strong and considered view is that there is no funding gap.* Our reformed program would include cutting transaction costs by over $1 billion annually; removing large liabilities faced by business and local, state and federal government agencies at Superfund sites; cutting current, non-cleanup bureaucratic expenditures by over $400 million and redirecting that money toward cleanup; and saving hundreds of millions of dollars at both federal facility and non-federal facility NPL sites because of remedy selection reforms. It has been demonstrated, through independent studies by both Peat Marwick and Price Waterhouse, *that even without the savings from remedy reform,* SR '95's reformed program will pay for itself under the current taxing scheme. *In short, there is no funding gap!*

Our confidence has been further buttressed by the General Accounting Office which, in July, concluded that only "[a]bout one-third (or 71) of the 225 sites contained in EPA's data base posed health risks serious enough to warrant cleanup, given current land uses." If this is true, then this perceived "funding gap" is truly a myth and should not stand in the way of true reform.

But even if you do not accept our conclusion that there is no funding gap, we have come up with several mechanisms which Congress can employ to fill such a gap. Each solution requires some participation by other Committees with jurisdiction besides Transportation & Infrastructure and Commerce. The need to involve these other committees—Budget, Appropriations, Ways & Means—is both the problem and solution to the last existing hurdle to full retroactive liability reform. Before closing the door to true, comprehensive reform, SR '95 urges the Subcommittee to fully explore our various recommended funding mechanisms with these other Committees.

I. FUNDAMENTAL SUPERFUND REFORM—KEY FUNDING ISSUES

As Congress moves to enact Superfund reform legislation, the debate recently has been focused on funding issues. Everyone agrees that the current Superfund program is grossly unfair, wastes billions of dollars each year and accomplishes very little cleanup. Because the program is dominated by its focus on fundraising, approximately half of its total costs are for non-cleanup activities. Comprehensive reform, including the repeal of retroactive liability as of 1987, is urgently needed this year. Superfund must be rebuilt from the bottom up. Regardless of the level of FY' 96 appropriations, it is essential to replace litigation and delay with an efficient program focused on human health and environmental protection and on risk reduction.

Unlike almost every other federal program, Superfund has no budget. EPA raises funds for cleanup on a site-specific basis and has no incentive to operate the program cost- effectively because someone elses checkbook (the PRPs) is paying for cleanup. Inevitably, this process generates huge amounts of disputes over costs, delay, litigation among EPA and the PRPs, and wasted transaction costs. After 15 years less than 15% of the sites on the NPL have been cleaned up. A reformed program must establish a budget for cleanup that prioritizes sites and focuses on those with the most immediate risk. Congress must then establish a mechanism to ensure that the funds collected for Superfund will be spent on the program. Our testimony suggests several ways to do this. We leave it to Congress to decide which is the most suitable.

After considerable effort, we have determined that approximately $2.3 billion is necessary to run an efficient, reformed Superfund program, without liability for disposal before 1987. Indeed, our research indicates that this level will produce major surpluses very quickly that can be used to extend reforms to state sites and help brownfields redevelopment. Others outside SR '95 believe that this money is required for the NPL list alone. Only time and real reform will tell, but this amount should be adequate to fund retroactive liability repeal before 1987 at current NPL sites.

II. ADVANTAGES OF FULL REFORM & THE CONSEQUENCES OF PARTIAL REPEAL

Some are arguing that although comprehensive Superfund reform is the main goal, scaled-down versions of liability reform will accomplish many of the same objectives. Superfund Reform '95 maintains that Superfund reform requires an integrated approach including liability, remedy selection and other structural reforms. Fundamental liability reform is linked to all other key components of reform. It produces positive incentives on all aspects of the program. If repeal is scaled back, the negative impact of retaining the basic liability structure ripples out to other aspects of the program. Partial repeal prevents the other key reforms included in H.R. 2500 of (remedy selection reforms, state delegation, etc.) from achieving the maximum benefits they would generate from a comprehensive approach. By leaving most of the flawed liability system in place, the lawyers and bureaucrats will still be the key players in this cleanup program—not the engineers and scientists.

The following is a list of the major objectives of Superfund reform legislation, as outlined by the Committee's leadership, and the impact of partial reform proposals on these important objectives:

Speed of Cleanup: Full retroactive liability reform would accelerate the pace of cleanup by 80%. Economic models project that compared to the current program's record of cleaning up 330 sites over the next 5 years, one modeled on SR 95's plan would produce 600 site cleanups over the next 5 years.

Under Partial Repeal: H.R. 2500 leaves the battles over money in place at about 79% of the sites. The bill only eliminates liability at 21% of the NPL—at municipal solid waste sites. Although the bill carves out these contentious, multi-party sites, it still leaves the same fundraising system and the associated disincentives to fast, efficient cleanup in place at all remaining sites. The combination of a much more complicated and fact intensive allocation process and lower levels of funding channeled directly to cleanup efforts will impede the pace of cleanup.

Delays Caused by Disputes: Eliminating retroactive liability would eliminate the need to fight over cleanup costs. Disputes that occur under today's liability system between EPA and PRPs that take a minimum of three years would be altogether eliminated.

Under Partial Repeal: The dominant characteristic of H.R. 2500 is to shift costs from large PRPs to other PRPs, and to shift these costs earlier in the process and with the Government forcing (and paying for) the process rather than private cost contribution efforts. Today's system drags on because of battles over money. One of the great myths of "proportional liability" is that PRPs would stop battling EPA

once shares are allocated. On the contrary, the law and engineering firms they then jointly hire will likely fight EPA over each major cost decision. Reimbursing 50% of the PRPs cleanup costs (not their litigation/transaction costs) as H.R. 2500 proposes is unlikely to alter such PRP incentives although hopefully it might moderate EPA remedy selection decisions.

Transaction Costs: Under full liability reform, total PRP and insurer transaction costs would be slashed 85% (from $960 million to $137 million).

Under partial Repeal: These costs would increase for the majority of parties under the proposed allocation system. First, more parties will be drawn into the system, earlier, and will pour legal and consulting fees into the intensive, though perhaps compressed, battle over allocation of shares. Any post-allocation transaction cost savings by PRPs will probably be offset by the increased Government transaction costs of running this system. The records do not exist at most sites to fairly, rationally, or efficiently allocate liability based on volume, much less based on the other "Gore Factors" in H.R. 2500. The 1% liability exemption, which kicks in after the process has churned on, will be illusory for thousands of small businesses, as they will still get dragged into the process and be forced to pay legal fees and spend management time and resources. The larger PRPs will have a greater incentive to bring as many of these parties in early and have their shares picked up by the fund so that the remaining costs to be allocated among the PRPs at the site will be lower.

Eliminating Small Businesses from the Liability Net: Under retroactive liability repeal prior to 1987, "the blame game," as Chairman Oxley refers to it, would end. RCRA is the primary law that instructed businesses where they should send their waste and what kinds of records they must keep, not Superfund. RCRA's expanded disposal rules and cradle-to-grave record-keeping requirements did not apply to waste generators of less than one ton a month until late 1986. After 1986, accurate records would exist to fairly allocate cleanup costs among parties at sites.

Under Partial Repeal: By eliminating one class of sites, municipal landfills (approximately 250 sites or 21% of the NPL), H.R. 2500 moves toward ending the devastating impact that Superfund's retroactive liability system poses for some small businesses. This is certainly good news for PRPs at those "muni" sites. The legislation also proposes to exempt *de minimis* contributors (1% or less of waste at the site) from liability prior to 1987—but these parties must participate in a liability allocation process. A proportional allocation system, even if "accelerated" for small parties, requires legal and technical resources. Small businesses are at a huge disadvantage in this allocation scheme because they do not have either the resources or the records necessary to defend their actions and receive a "fair share."

H.R. 2500 includes a liability carve-out for parties recycling certain types of materials in the past (scrap metal, batteries, glass, paper) and an exemption from liability in the future as long as the parties demonstrate due care. This carve-out does not apply to some major categories of recycling such as used oil, drums, or solvents. Many small and medium companies relied on government standards (state and municipal directives) in choosing past disposal options. These "innocent disposers" also deserve exemption; waste often sent to state-licensed recycling facilities, or locations mandated under "flow control" laws, later became part of a Superfund site. Yet businesses who followed these laws are left as PRPs under H.R. 2500, with no defense against liability.

The Trust Fund will pay a percentage discount ("retroactive liability discount") to PRPs not released from liability. PRPs would receive this discount irrespective of the presence or level of orphan shares at a site. Thus, a single party chemical manufacturing facility with a solvent owner would get 50% reimbursement of cleanup costs from the Trust Fund, and a multi-party combination MSW and industrial waste site with a 50% orphan share and many exempted and "MSW limited" parties would get the same 50% rebate. The rebate is to be paid when the site work is completed if funds are available.

Eliminating Liability for Local Governments: Repealing retroactive liability prior to 1987 would allow local governments to meet the four primary responsibilities local governments have with respect to Superfund sites: (1) rapid cleanup; (2) reducing transaction costs; (3) returning unproductive, non-taxable land to productive, taxable status; and (4) protecting the local tax base and the economy.

Under Partial Repeal: By eliminating liability altogether at the approximately 250 municipal landfills on the NPL, H.R. 2500 provides relief from litigation costs and cleanup costs for some local governments. Again, a very good result for these benefitted municipalities. Municipalities who own property (either purchased voluntarily or may have acquired through foreclosure) with contamination will still be held liable. Municipal liability associated with industrial activities, as well as tort liability for regulatory operations, would continue under H.R. 2500 and would not be included in the exemption designed for co-disposal landfills.

So what is the problem? Simply this: a percentage cap or exemption for a municipality (or any other group) merely results in a shifting of costs and burdens from one group of parties who complied with the law at the time of their actions to the group of parties who remain at the site. The cleanup of Superfund sites is not just a municipal problem. It is a problem that faces all interests in a community, since municipalities can not survive without a strong business base. Local businesses—small, medium and large—fuel the economies of our communities. The economic viability of a municipality entangled in the Superfund web will remain at stake under H.R. 2500 through the many indirect effects of a liability scheme that does not eliminate the root problem—retroactive liability.

Prioritization of Sites According to Risk: By establishing an annual budget for Superfund and requiring that the program focus on cleanup of those sites posing real, current risk to human health and the environment, fundamental reform will accomplish this common sense approach to cleanup. A recent GAO report states that only 25% of the 600 sites studied presented real risk. Under today's system which is focused on fundraising, EPA does not have any incentive to focus on risk. Without the need to raise money site by site, engineers and scientists can be the decision-makers, rather than enforcement attorneys at EPA and DOJ.

Under Partial Repeal: Trust Fund monies will not be free to be applied according to a prioritization of sites based on real public health risk. They will continue to be spent (1) where there are no PRPs, and (2) as a discount where there are PRPs, serving as a "caboose" on prior enforcement decisions. This is in stark contrast to the goal of having larger Trust Fund cleanup resources applied to the worst health risk sites, irrespective of PRP presence.

Eliminating Uncertainty for Unlimited Cleanup Costs: Fundamental liability reform will remove liability for tens of thousands of small businesses, local governments, non-profits, school districts and others for whom contingent liability destroys access to credit, financial viability and the ability to grow within the community.

Under Partial Repeal: Under H.R. 2500 all parties will likely be left uncertain as to their percentage share at a site for at least 2 years. Translating this into an actual dollar figure for cleanup costs will take much longer, which can have a devastating impact on these businesses. This uncertainty is especially devastating for small businesses, as it limits their ability to get credit and stifles their growth. Even "expedited" *de minimis* settlements under H.R. 2500 threaten small businesses. A settlement for 1% of a $20 million dollar cleanup at a site would be $200,000. These are astronomical figures for most small companies that could easily put them out of business. Uncertainty will continue under this proposal—in fact it will hurt smaller firms earlier than it does today. H.R. 2500 allows a small business faced with such liability to prove to EPA its inability to pay. While well intentioned, this process would require small businesses to disgorge enormous financial information to government bureaucrats in the hope of securing an equitable adjustment. Requiring small business to admit, much less prove, their destitution in the face of their liability is enormously hostile and impractical, placing all the power in the hands of EPA. This is hardly a benevolent provision from the perspective of small business.

Extending the Reforms to non-NPL sites; Spurring Redevelopment in Urban Brownfields: SR '95's proposal includes an optional fund—generated from the surplus developed as site cleanups were completed, remedy reforms kicked in, and the size of the NPL declines—available to qualified states for non-NPL site cleanups. Fundamental liability reform would also eliminate the disincentives created by unlimited potential liability to developers that causes them to leave available urban land undeveloped, unproductive and a drain on the local government.

Under Partial Repeal: Reform would be confined to the NPL. States would get delegation of the program, but they would get no funding and no resources for those high-priority state sites that, with a capping of the NPL, would no longer be eligible for federal attention. Special exemptions for prospective purchasers and banks would eliminate liability fears for certain parties, but these deals effectively create a positive incentive for banks to foreclose on parties who own land in urban areas, but cannot afford the unlimited cleanup costs.

It is clear that repeal of retroactive liability prior to 1987 is the only way to ensure real reform for all of Superfund's stakeholders. Anything short immediately picks winners and losers and will not effectively improve the program.

III. SUPERFUND REFORM '95'S FINANCING PROPOSAL: STUDIES PROVE THAT CONGRESS CAN ACHIEVE FULL REFORM WITHOUT ANY ADDITIONAL TAX BURDEN ON THE ECONOMY

Superfund Reform '95 has spent considerable time and resources studying what the existing Superfund program spends today and for what purposes those funds are used, all for the purpose of analyzing what resources are necessary to fund a re-

formed program. These estimates are outlined in great detail in "The Costs of Superfund and Proposed Reforms," a May 1995, study by National Strategies. Two nationally recognized accounting firms, the Barents Group of KPMG Peat Marwick and Price Waterhouse validated this report and SR '95's financing proposal. I refer you to these reports for a detailed discussion of these costs and the sources for all of our figures and assumptions. I also ask that copies of these reports be included in the record.

Our group began its study of Superfund with the costs of the existing program. Under Superfund today, the total annual cost of the program is around $4.3 billion. This includes direct business taxes ($1.45 billion), appropriations from general revenues ($250 million), appropriations from state general revenues or dedicated trust funds ($100-150 million), regulatory taxes, PRP site settlements and cost recoveries (just under $1.5 billion), hidden or regulatory costs reflected in private sector transaction costs (about $1 billion) and an unquantifiable amount of lost opportunity costs created for companies and local communities.

Out of over $4 billion spent annually on Superfund, only about $2 billion is spent on cleanup activities. The liability/financing focus of the current program forces EPA to focus on enforcement activities, rather than remediation activities. Our analysis concluded that this pre-occupation is not only inappropriate in terms of the program's priorities, it is destructive to the goals of the program, and it is highly inefficient. In 1994, in order to raise $1.47 billion in cleanup-related payments from PRPs, the total public and private sector transaction costs resulting from Superfund's site-specific financing structure totaled $1.34 billion. In other words, it cost approximately 90 cents to raise every dollar in cleanup funds.

SR '95's proposal to remove retroactive liability for disposal prior to 1987, along with overhead reductions would lower the overall transaction costs by 77%, while reducing the overall cost to the economy by $1.8 billion. Our program keeps the same level of funding for cleanup, but the vast majority of these non-cleanup costs would be eliminated and much of the money wasted today on transaction costs and EPA overhead would be redirected to cleanup.

IV. KEY ISSUES IN REDIRECTING FUNDS TO CLEANUP

Reasonable people can certainly differ on how to raise the $2.3 billion figure needed to for fully replace retroactive liability, and towards this end I would like to raise some major issues related to the costs of a reformed program. It is important to emphasize, as we talk about a reformed program, that many of the reforms we all agree on will radically change how Superfund cleanups are implemented and will therefore, have a major impact on costs. These issues, we submit, are in Congress direct control. We suggest that you consider the budgetary impact of each of these areas as you review cost estimates for Superfund reform legislation this year:

A. *Redirecting non-cleanup funds to cleanup activities:* Most of the proposals supported by various groups do not assume that it is within Congress' reach to reduce funding levels for non-cleanup (e.g. EPA overhead, enforcement) activities and increase direct cleanup funding. The various studies which support SR '95's position detail the significant savings that can be achieved by redirecting money from what some call EPA's "core budget" and from other non-cleanup spending. We maintain that this is a key component of real reform. Hundreds of millions of dollars can be re-directed to cleanup if Congress will carefully review the current Superfund budget and strip out of it any spending which does not advance the primary goal of cleanup.

B. *Cost of cleanups/contracting reforms:* Most Superfund cost studies, including the model created by the Business Roundtable, assume that cleanups under a reformed Superfund will cost about the same amount as EPA spends today—that is, highly inefficient government contracting. Major reform should not assume "contracting business as usual" by EPA, just with more money and more sites. Indeed, SR '95 believes the legislation must include a detailed package of contracting privatization reforms. These should allow an assumption of average remedial costs equal or close to the current PRP costs—which we estimate to be 20% lower than the current Fund-lead costs (CBO says 13%). We think keeping costs at the current level of PRP costs under the current horrendously inefficient system is a relatively modest goal.

SR '95 has developed a detailed package of suggested reforms through discussions with PRPs performing cleanups, cleanup contractors, and others. We have shared these materials with your staff. These creative ideas will generate new incentives and cost-effective methods for performing Superfund cleanups at far lower costs than today's program.

C. *Superfund costs will go down with remedy selection reform and capping the NPL:* As sites get cleaned up and delisted, the overall costs of the program will decline substantially. Our model shows major savings from the $2.3 billion target as remedy selection reforms are implemented. Others disagree. But we all agree that within the latter part of the next 10 years, the overall costs drop substantially if the NPL is capped. In simple terms, there is a surplus, and the disagreement is how soon it occurs.

SR '95 proposes a flat funding package for the program going forward because we believe that some funding should go to the states for non-NPL site cleanup and brownfields redevelopment. Congress will ultimately decide how much it should spend on the program and what benefits will result from helping extend reforms beyond the sites currently on the NPL.

D. *Costs of what PRPs spend today are vastly exaggerated:* Some, including the Congressional Budget Office, have inflated the costs of what PRPs are paying at sites today. They therefore claim that the costs of repealing liability prior to 1987 will be too expensive. Yet our view is the same as EPA's view was last year, when Administrator Browner submitted written testimony to Congress that PRPs spend about $1.3 billion annually. For a detailed analysis of this issue, please refer to the NSI report and the Peat Marwick study.

V. INCLUDING ALL SOURCES OF REVENUE IN A REFORMED PROGRAM'S BUDGET

Some Members of Congress and some industry representatives, despite the financial analysis from economic and budget experts, continue to argue that there is a shortfall or "funding gap" between the amount of money coming into the Superfund program and the costs of the reformed program. If by this they mean the gap between the $1.5 billion in dedicated business taxes and the funding needs of the reformed program, they are, of course, correct.

But before we explore ways to provide money from the federal budget, this view fails to consider several non-federally appropriated sources of money that would still be coming into the program. Before making any assumptions about a shortfall in financing, these income sources must be added to the direct business taxes in accounting for how much money is available for a reformed program. These revenue sources include:

- Post-1986 disposal: Both SR '95 and CBO estimate that 5% of disposal costs can be attributed to post 1986 disposal. PRPs would continue to pay this amount if a 1/1/87 liability cut-off date were used. This is an additional revenue source of $65 million.
- Illegal disposal: The draft legislation already excludes from the liability changes it makes any parties which violated disposal laws of the time. Assuming $1.3 billion in current annual PRP payments, and 5-10% of disposal liability coming from illegal actions, this is an additional revenue source of $65-130 million.
- State payments: The states currently pay about $150 million per year in statutory shares at NPL sites. H.R. 2500 adopts the policy of a flat 10% share (but says this should not exceed any state's current payment). Thus, this is an additional revenue source of about $150 million.
- Federal agency PRPs: Various federal agencies currently pay collectively about $150 million per year in PRP liability (not including transaction costs) from their individual budgets (or that of DOJ) at non-federal facility NPL sites. Repealing retroactive liability for these PRPs would place these costs on the Fund. The House bill calls for interagency transfers of up to $200 million to address this issue. This is an additional non-appropriated funding source of about $150 million—which would not have to fit under the relevant appropriations cap.
- Cost Recoveries: The House bill continues this program which produces about $200 million per year in revenue from PRPs.
- Savings at Federal Facilities from remedy selection (35%): This bill will save about $500 million annually at the end of a four year phase-in period for NPL sites alone; almost twice that if all federal facilities are included. Some credit should be extended to the other part of the program for these savings, perhaps $200 million annually.
- Appropriate Trust Fund interest: Current interest on past, unappropriated business taxes adds another revenues source of $175 million.

Some additional sources of revenue discussed above stemming from a reformed program with major liability and structural reforms which could be added to cost estimates include:

- Legislating Overhead/"Core" Program Cuts: Eliminating unnecessary EPA overhead saves $100-300 million.

• Apply savings for implementation of contracting reforms: As mentioned above, Superfund cleanups will maintain the current PRP level through projected savings of 20% phased in over 4 years = $100 million (1st year)—$400 million (4th year).

If there is indeed a "gap" to achieve the $2.3 billion level of funding for the program, it can certainly be filled through a combination of these sources. Superfund Reform '95 has offered the menu of options listed above to committee staff to cover any shortfall. Congress can decide, if necessary, which of these options (or a combination) is the most appropriate.

VI. FINANCING OPTIONS

The leadership in this committee and in Congress has designated full repeal of retroactive liability as a major objective of Superfund reform this year. Our coalition of over 1100 members nationwide representing hundreds of thousands of small businesses, chambers of commerce, local governments, school districts, concerned citizens and others who support this goal and will continue to work with you to enact legislation that includes this crucial element. The testimony above suggests additional sources of revenue to include in your funding analysis that will help you raise the $2.3 billion necessary to pay for a reformed program.

The Commerce and Transportation and Infrastructure Committees have jurisdiction over the reauthorization of this program, but they must work with other key committees in the House to design appropriate mechanisms for ensuring that the funds collected for the program are spent on the program (unlike today) and that sufficient funds are appropriated for these purposes. We would like to suggest several financing options to you and defer to you and your colleagues to determine which of these financing mechanisms is the most appropriate. All of these financing options support repeal of retroactive liability prior to 1987 without raising any new taxes:

• Full appropriation of all current Trust Fund revenue: $2.2-2.3 billion can be raised by appropriating the same amount from general revenues as today, plus all current income to the Superfund Trust Fund, an inter-agency transfer in lieu of federal agency liability and a 10% state match.

• Borrowing Options: three suggested ways to fund any short-term shortfalls in the initial years of a reformed program:

1. *"Green Bonds" financing:* Funds could be drawn from "green bond" sale proceeds on an as needed basis to finance cleanup and,indeed,to accelerate cleanups for sites which otherwise would have to wait for funding. Likewise, these funds could be directed towards high-priority state site cleanups or, in anticipation of future surpluses, earmarked for this purpose. Required cleanup funding would be raised through the issuance of bonds (as low as $1.1 billion, as high as $10 billion, with maturity of 10 years or less). "Core" program costs would be financed through a general revenues appropriation of approximately $300 million annually; all business taxes would be earmarked exclusively for cleanup and bond defeasance.

2. *Partial Use of Bonds:* Use bond issuance only to fill the annual gap—if any—in cleanup amounts needed after appropriations action.

3. *Treasury Borrowing:* Any funding required in addition to Government appropriations could be borrowed from the Treasury against future tax revenues. Current law allows borrowing of up to one year's worth of Trust Fund receipts (i.e. $2 billion).

• Utilization of a Revolving Fund: Expiration of all Superfund taxes at the end of 1995 offers an opportunity to recreate the Superfund Trust Fund as a mechanism to self-finance Superfund cleanup. A revolving fund would be financed through an extension of the current level of Superfund business taxes, re-characterized as "offsetting collections". The income from these assessments would be credited to the appropriations committees to fund cleanup activities. The Fund would not be off budget, but it would be dedicated solely to site cleanup and emergency removal. The $1.5 billion deposited into the fund annually would be earmarked for cleanup; remaining cleanup and core program functions would come from annual appropriations, thus lowering amounts needed under appropriations caps by $600-700 million from FY 95.

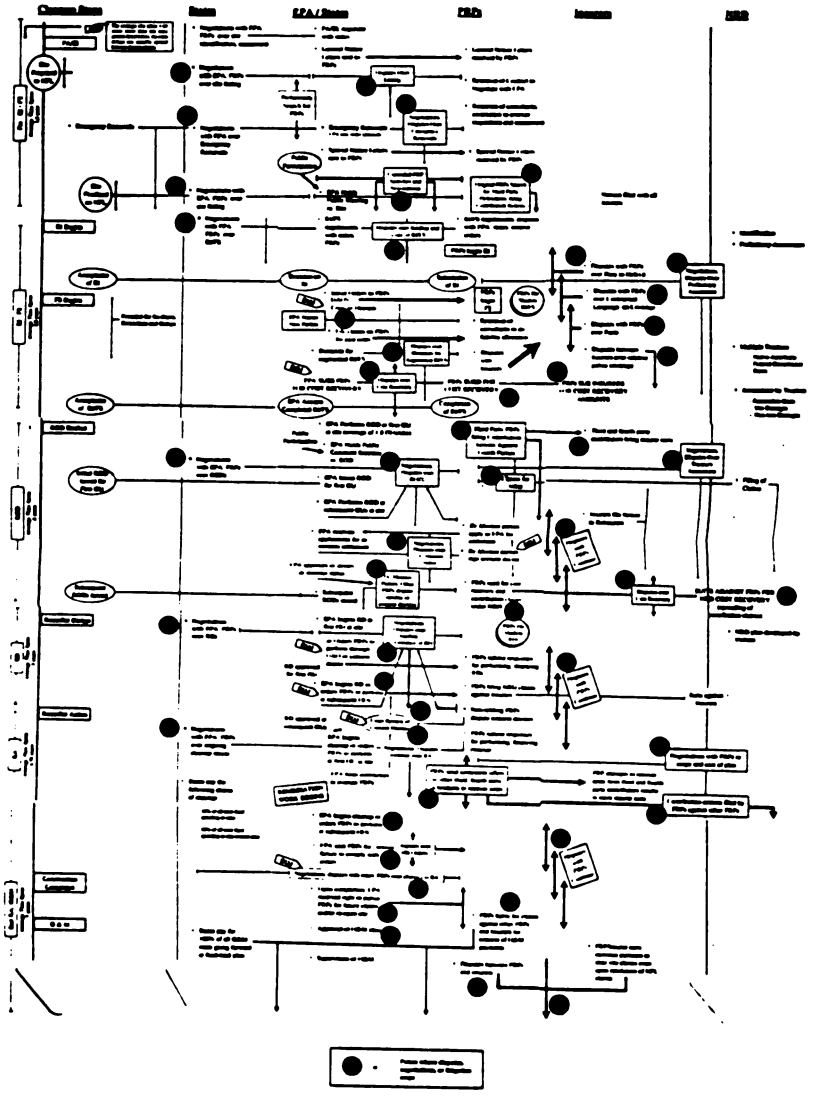
• Delayed Reimbursement of Some PRPs: Any reformed program would need to continue PRP management of cleanups for several years after implementation as a matter of transition. Cash demands on the Fund could be reduced initially by only reimbursing PRPs when sites are cleaned up, or further delaying some payments until the money is available.

CONCLUSION

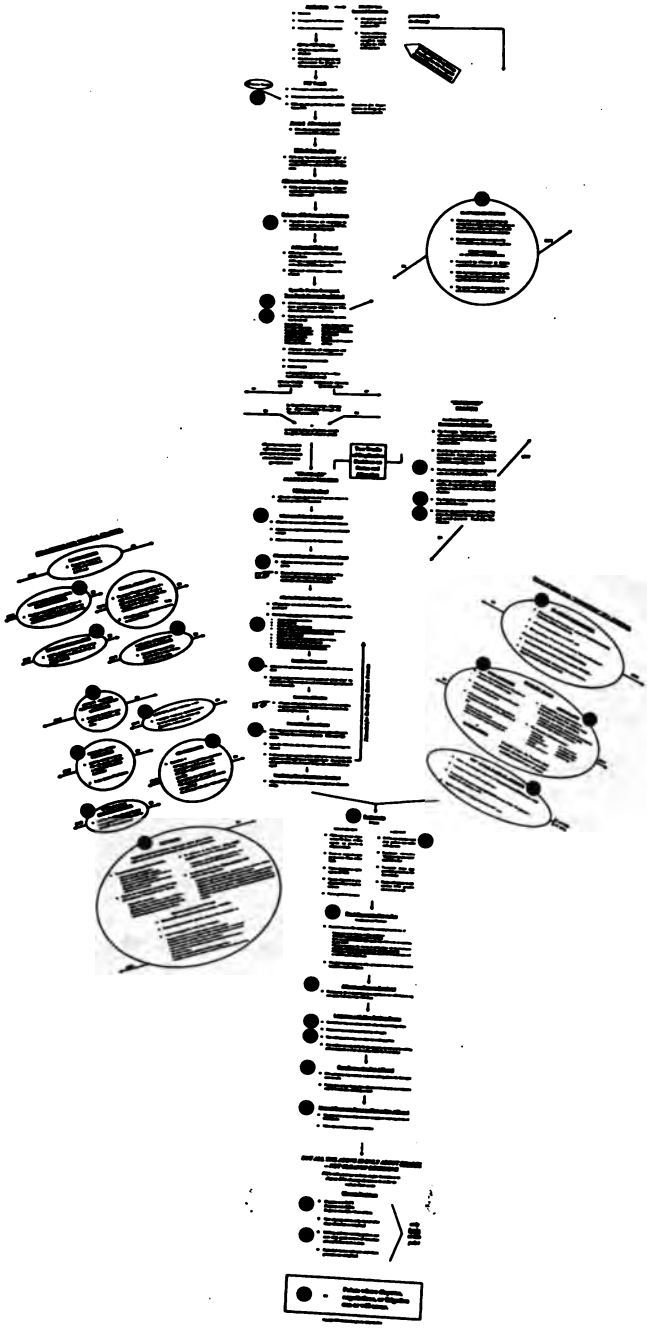
We respectfully submit that any one of these financing options will allow Congress to achieve its stated goal of fundamental Superfund reform. We remain fully committed to assisting the Subcommittee in the effort to craft solutions that will enhance H.R. 2500 and move it closer to achieving the goal of fundamental reform. In that regard, we are flexible and we are eager to dedicate our resources to finding solutions that the Subcommittee can adopt in the markup process.

Superfund Today

The Current Superfund Program



The H.R. 2500 Plan for Allocating Shares of Liability



Mr. OXLEY. Thank you, Mr. Baker. You'll be available for questions, I'm sure.

Mr. BAKER. Thank you.

Mr. OXLEY. Let me begin the questioning with Ms. McKee.

There is near universal agreement that small businesses have been treated very unfairly in the existing Superfund program and I want to understand your testimony correctly.

If this committee were to adopt provisions, (1) eliminating oil recycling sites from the liability web as we have done with municipal solid waste landfills and, (2) providing for some form of cost shifting in the potentially responsible party listing process, are you indicating that at that point NFIB would endorse H.R. 2500?

Ms. MCKEE. Mr. Chairman, we still hope to work with you on retroactive repeal and I know you are still open to that and looking at other options but short of being able to do that, the changes that you have stated, including the elimination at all recycling sites and a cost shift, we would support the bill.

Mr. OXLEY. I thank you. ROSA would certainly benefit from NFIB support and I will direct the staff to work with you as promptly as possible, attempting to work out some language that may overcome your final concerns with H.R. 2500.

Let me ask Mr. Wilson, because I know you have to leave, and I didn't want you to leave back to Philadelphia without at least one question, CMA has devoted considerable resources in working with members of the committee and staff on the funding issues for this year.

We thank you for your commitment to sensible Superfund reform. On behalf of the CMA, can you tell us today that H.R. 2500 will work, how it will work funding-wise in your estimation and do you have any recommendations other than what you have seen in H.R. 2500 regarding funding?

Mr. WILSON. No, I have no further recommendations, except the comment that I made on the insurance industry but we are in the preliminary stages of looking through the data on what we think H.R. 2500 provides.

We know the BRT has done more work than we have so far but our estimates conclude that the funding that is provided by the current Superfund taxes will match up with what is required in H.R. 2500 and CMA's preliminary estimates in fact are very close to the BRT's.

Mr. OXLEY. Thank you. Mr. Burt, I want to thank you and other members of the Business Roundtable for the enormous resources and experience that you have devoted to our reauthorization process.

There are those outside this institution and some in that feel that those most affected by legislation should not have anything to say about how that particular legislation is enacted and indeed I find that a rather interesting experience.

I think you have shown that someone who has had real experience and you cited the number of cleanups that your corporation has done and the number you can do under this bill would lend the lie to that kind of approach.

Particularly, I want to commend you for making your computer modeling system available for our staff because that really gets at

using an effective model to determine the reform proposals that we have discussed this year.

I would like to ask you some questions about the modeling itself.

Your testimony indicates that H.R. 2500 "can be successfully implemented and allow for the program to improve substantially by some 50 percent over its historic pace."

I wonder if you could elaborate on this dramatic increase in cleanup outputs and how that could occur.

Mr. BURT. I would be glad to.

First, the historic pace needs to be put into a baseline.

I think over the last 5 years the EPA has in fact cleaned up about 280 sites. Our estimate under this bill is that we could do 574. I think the EPA's estimate is that they could do around 400 sites, even though I understand that Carol Browner testified today that they are doing about one a week, which of course would only be significantly less.

What I think will happen is that the remedy reforms, the elimination of joint and several, will significantly encourage companies to go ahead and settle the litigation and the delays we think will be significantly reduced and that based on historical data that we should be able to significantly improve the speed with which we bring these sites to conclusion.

One of major drivers of delay is the unreasonable remedy selections and companies will resist that as long as they know they are spending money that is not going to improve the environmental protection.

This bill eliminates that.

Mr. OXLEY. That is a good point and I appreciate that remark.

The gentleman, my colleague from Ohio.

Mr. GILLMOR. Thank you, Mr. Chairman. A couple questions for Mr. Baker.

I agree with a lot of other people that one of the major problems in the Superfund is the large amount of money that is spent on lawyers by PRP's and fighting each other and fighting the EPA and the money ought to be used for cleanup, and I support getting rid of retroactive liability as do a number of members on this committee, but as you know, there is concern on the funding.

In that respect, let me ask you, it would seem that a major part of the transaction costs in this process are at sites where there is more than one potentially responsible party. Is that a correct assumption?

Mr. BAKER. I would agree with that very strongly. Yes.

Mr. GILLMOR. Do you have any idea what percentage of the Superfund transaction costs that multiparty sites have spent on lawyers?

Mr. BAKER. Well, Rand would suggest to you that about 30 percent of the costs at a multiparty site would be transactional costs.

Mr. GILLMOR. How about single party sites?

Mr. BAKER. Much lower in the sense that since there's only a single person to deal with, a single party to deal with, it's probably more in the vicinity of 5 percent.

Mr. GILLMOR. Could you tell me approximately how many of the sites on the NPL would be considered multiparty and how many proportionally are single party?

Mr. BAKER. Yes. Of course the definition of single party is the key there.

We would estimate that for single parties where there was one PRP who owned and operated the facility it would be about 140 sites. If you talked about a facility where there was only 1 contributor to the pollution you would probably talk about 330—different from the 140—so collectively maybe in the vicinity of about 450–500 sites, which is about 38 to 39 percent of the National Priority List.

Mr. GILLMOR. If the bill before us were amended to include repeal of retroactivity only at multiparty sites, in your opinion would that close the perceived funding gap?

Mr. BAKER. It would go a long way to doing that.

We view, first of all, that there isn't a funding case. We made the case and we have talked at length with anybody who could listen, both the Peak Marwick Study and the Price Waterhouse Study show that there is not a funding gap.

Given the fact that the debate continues though, to the extent there is a funding gap variously stated between $300 and $700 million, we think about $500 million would be reflected in the multiparty, single party dichotomy there, meaning that single parties would pay about $500 million to the system every year and you would very well close a perceived funding gap.

Mr. GILLMOR. In the event we made that kind of change in ROSA would your group, Superfund '95, be supportive of that type of approach to retroactive liability?

Mr. BAKER. Under the assumption if we made it and we had run through the process to the point where it's quite clear that there was not going to be any other more elaborate extension of liability reform, that kind of reform would go very far towards the goals, the shared goals of getting rid of the lawyers, getting rid of the transaction costs and reaching out to the most number of parties, particularly small parties, the kind of people that K.C. was talking about and the Mayor, so that would be an extraordinarily favorable result in terms of a true reform of Superfund.

Mr. GILLMOR. Thank you, and I don't want to pass up a question of one of our leading Ohio companies.

Dr. Bowman, coming from the oil industry, do you feel that the liability that you have in terms of Superfund bears a rational relationship to the degree at which you in the oil industry may have caused contamination at Superfund sites?

Mr. BOWMAN. I think that probably we are paying more than our fair share of taxes as against the number of sites we are involved with and I can further say that in the case of our company a number of the Superfund sites that we are involved with actually came out of our non-petroleum operations—some of our mining and metal operations that were no longer a part of our business but we still retain the liability of.

Mr. GILLMOR. Kind of along the same line, both to you, Dr. Bowman and also to Mr. Burt, industries are paying hundreds of millions of dollars into the trust fund. I guess my question is do you think you are getting your money's worth under the current Superfund program and do you think you would be getting your money's worth under H.R. 2500?

Mr. BOWMAN. We'll be getting more of our money's worth under H.R. 2500 than we are under the current program. Elimination of transaction costs is an obvious benefit but I think that the most important benefit that I see is that we can get on in a much more rapid paced fashion to do the cleanups and that our money will go farther and that we will accomplish more for the same amount spent.

We have had cases where we have done cleanups, most notably in the State of Alaska under State law and without Superfund ever becoming involved and the money has gone much, much farther and still accomplished everything that the law and regulation required, particularly as appropriate to protection of public health.

Mr. OXLEY. The gentleman's time has expired, and I know, Dr. Bowman, you'll be glad to hear that our friend from Massachusetts, Mr. Markey, is very concerned that the oil industry is paying too much in taxes and we hope to rectify that before too long.

Mr. BOWMAN. Thank you.

Mr. OXLEY. Let me ask Mr. Baker—I would like to take a few minutes to talk you through Table 3 on page 8 of the August 1, 1995 Price Waterhouse Report entitled "Estimates of Costs under the Superfund Reform '95 Proposal"——

Mr. BAKER. Mr. Chairman, may I just apologize? I want to focus on your question. Did you say page 8?

Mr. OXLEY. Page 8, yes. Table 3.

Mr. BAKER. Very good.

Mr. OXLEY. The bottom half of that chart is entitled "Financing" and lists a number of sources of funds for your Superfund reform program.

Mr. BAKER. Yes.

Mr. OXLEY. I would like to ask you about each item on the list.

Price Waterhouse estimates the current level of business taxes as $1.46 billion. These funds would have to be fully appropriated to be available for cleanups. Is that not correct?

Mr. BAKER. We would hope that would be. Under the normal course, that's right. Failing the kind of recommendations we have made to you—to use a revolving fund or other creative techniques which have been used in other areas—if you got help out of the appropriators and the budget people to create that kind of a revolving fund you would not have to appropriate those dollars every year but if you didn't do that, yes, so that is a technique we have proposed to you.

Mr. OXLEY. Interest on the trust fund is estimated to be $162 million annually. Isn't it true that these funds need to be appropriated as well?

Mr. BAKER. Yes, they would be. Somebody gets them every year. We think we should get them, like Mr. Bowman says.

Mr. OXLEY. The $250 million counted from general revenues needs to be appropriated also, does it not?

Mr. BAKER. Yes, it does, but what we envision on that so you know what you are getting for your dollars, as opposed to it's just $250 million coming for no reason, it comes because we believe you are eliminating the liability that the Federal agencies have as PRP's at non-Federal facilities, so we think there is a quid pro quo

of value received for the Government in doing that. That is why there should be a good rationale for continuing it.

Mr. OXLEY. Well, that brings me to the next question.

An additional appropriation for Federal liability of $100 million also needs to be appropriated, correct?

Mr. BAKER. Well, it is appropriated today.

Mr. OXLEY. It needs to be appropriated, $100 million.

Mr. BAKER. Yes. For example, the Department of Defense or Agriculture gets an appropriated dollar amount, $30 million for the CCC for example or $60 million for DOD, so the appropriators appropriate that, but it is in the budget today.

The question is how you get it to have value as a Superfund dollar and that is your challenge there.

Mr. OXLEY. For your proposal the total amount that must be appropriated under the current discretionary caps is nearly $2 billion annually, is that correct?

Mr. BAKER. I haven't added it, but I'm going to assume you did and there's no reason to dispute that.

Mr. OXLEY. And finally, even after all the funds are totalled Price Waterhouse still finds your program spending $50 million per year more than it is taking in, is that not correct?

Mr. BAKER. Under the existing circumstance, that's correct, but of course you are talking about—the whole purpose of this is to talk about a reformed program and how you in working with your colleagues will put this together in such a way that you will resolve that problem, so yes, and of course we haven't talked about remedy reforms. We haven't used a nickel in here for the remedy reforms, so that is how we do it. You're right. You're right.

Mr. OXLEY. So basically you are talking about a $50 million funding gap——

Mr. BAKER. Made up by remedy reforms easily and that is what on Wall Street they call the "doomsday scenario."

If all your assumptions are driven to the most conservative, how can you make up the gap? So we used the remedy reforms. Only then do we use the remedy reforms to bring our books into balance, and that is what Price Waterhouse and that is what Rudy Penner at Peak Marwick both concluded in these reports.

Mr. OXLEY. I would like to ask our two CEO's if they would mind commenting on that, on what we just went through with Mr. Baker.

Mr. BURT. The conclusions of our 70-plus model runs plus getting input from the EPA, your staff, and the Congressional Budget Office would think that in order to accomplish the program and fully fund retroactivity with the remedy reforms in would require $2.2 billion.

There are a lot of assumptions that can be jiggled around.

I don't think we have done any model run that would approach the type of numbers that are in this Price Waterhouse Study but we would be glad to—well, I think we have provided the committee with a lot of our analysis on the BRT and we do not support those kind of numbers.

Mr. OXLEY. Dr. Bowman?

Mr. BOWMAN. I really can't add anything to that, Mr. Chairman. Our own work, because we are representing only our company, have not looked in any rigor at the broad issue raised.

Mr. OXLEY. Sure, Mr. Baker?

Mr. BAKER. Just one point. I don't blame Mr. Burt. Maybe he doesn't know this, but I think the BRT did model numerous of our runs, which would suggest a very favorable outcome, indeed turning out multiples of the outputs of existing baseline situations, so, you know, I think if we looked back in the records we would find some of that.

Mr. BURT. Let me make it clear. I can state what the BRT's position is and we think on a reasonable range of assumptions it will take $2.2 billion, that we could not do this program for $2 billion, and I think remedy selections will significantly allow us to get under $2.2 billion.

We do not agree with the assumptions that went into the run that we did for Superfund Reform '95.

Mr. OXLEY. Well, you heard, or maybe you didn't, but our 2 members testified today, Mr. McIntosh from Indiana and Mr. Zeliff from New Hampshire, about kind of a look-back provision that would encompass the potential savings in the program itself. That is, in our bill we estimated a minimum 35 percent, and we think that is a conservative estimate in terms of the savings.

Have you, Mr. Burt, given any thought to that proposal or is there any BRT information out there that might be helpful?

Mr. BURT. We assumed in our runs that we would get 35 percent savings on an average site so I am not familiar with how a look-back would fit with that, but it is assumed in our work that that in fact would happen.

Mr. OXLEY. Mr. Baker, did you hear the testimony from Mr. Zeliff and Mr. McIntosh?

Mr. BAKER. I did. I find it to be a creative suggestion, one which we have not suggested, of the 15 or 20 solutions we have put forth, using all kinds of opportunities to do this, we haven't put that one, but creative minds come up with solutions to problems when they want to, and I think that is an interesting one.

We will pursue and try to figure out and give our best recommendation to the committee about what that is and how it might do it, if you are interested in that—more than happy to do it.

Mr. OXLEY. We're always interested in finding the funding necessary——

Mr. BAKER. Right.

Mr. OXLEY. [continuing] to get to our goal. Does the gentleman from Ohio have any further questions?

Mr. GILLMOR. Yes. Thank you, Mr. Chairman.

For Mr. Condie, in your testimony you stated that Superfund liability had caused California cities to reduce police, fire, and public safety activities and personnel, cut library and parks and recreation budgets, and increase taxes and fees.

I guess my question is do you think the government made a good trade, i.e., was the benefit to the public health and environment worth the cost in your opinion in reduced police, fire, and public safety services?

Mr. CONDIE. My reaction is I don't think we should have been involved in the first place.

We are the ones who really represent those little people who were talked about earlier and those small businesses and the amounts that they took to the landfills were really insignificant.

We are the officials in the position where the rubber meets the road. We have to make those very difficult decisions. We were sued. We spent a lot of money just trying to protect ourselves in the transitional costs and then there was a good deal of settlement money and there were some cities that were rather tenuous, quite frankly.

We have a very good budgetary system in our city. We handled it, but it was a big chunk and when you pay those kind of funds out for those kind of settlements you have to make some choices and every city had to make their own.

Mr. GILLMOR. I guess my question was was it a good choice and I think that your answer leans toward no, it wasn't a good choice or yes, it was, or you would rather not have had to have made it? Is that the——

Mr. CONDIE. I would rather not have had to have made it.

Obviously, when we reached a settlement we had to take the funds from someplace to make that agreement. We have been working as a group of cities for 5 years to try to provide and municipalities with some degree of insulation from large liabilities and we have worked very diligently in assisting in legislation to help us in that regard, help the citizens in that regard.

It happened. We paid for it. We did what we had to do to keep our balanced budgets. We have to do that.

Mr. GILLMOR. I guess one of the problems is in a world of finite resources where we can't do everything, at someplace, maybe here, we have got to prioritize that.

Just one other question. On the costs in your community, do you have any idea how much of it was related to litigation and argument over who was responsible as opposed to the amount actually spent on cleanup?

Mr. CONDIE. As far as our liability, we were a third party litigant. In other words, the EPA sued the Fortune 500, who in turn, because of joint and several liability brought us into the picture.

The $5-plus million that we spent in that litigation was to try to defend ourselves legally.

The cleanup costs are estimated to be $650–$800 million.

The corporate people indicated they wanted us to pay 90 percent of that. Obviously, you could have all had the keys to the city hall.

We had to jointly pay the transaction costs and then we had to finally reach a settlement with those who sued us and that was even a bigger chunk.

Mr. OXLEY. The gentleman's time has expired. The gentleman from Idaho, Mr. Crapo.

Mr. CRAPO. Thank you. I would like to follow up on the question of single party sites, probably with Mr. Baker or any of the members of the panel who would like to answer these questions.

It seems to me just from a fundamental point of view that the reason that retroactive liability is so critically important is that as a matter of principle it is not appropriate for the Federal Government by this statute to be requiring the liability past the time

deadlines or the time dates that we have talked about, and it's just a matter of principle in terms of the application of the law given the development of the last 30, 40, 50 years, is that correct?

Mr. BAKER. Well, it is morally unjust and that is what rankles people with its enormous unfairness. I would agree.

Mr. CRAPO. And as I see it, coming from the point of view of someone representing a State that has significant mining interests, if you were to select an option that singled out or took out single party sites, I can see how you can make numbers fit with that type of an approach, but is there any moral justification or principle justification to make that kind of a decision?

Mr. BAKER. The question you bring up with respect to the mining industry is very important to Superfund Reform '95 because as you know, the Mining Association here in town is part of our membership.

Mr. CRAPO. Yes.

Mr. BAKER. And it is very dear to us and our consensus opinions have always been worked out in that respect.

I don't know this to be exactly true—I didn't do the math—but "Resources for the Future"—you know that book that Kate Probst put together——

Mr. CRAPO. Yes.

Mr. BAKER. They suggest to us that about 70 percent of the mining industry's liability problems are resolved by multiparty exclusions.

Now what is important there is it shouldn't be a situation where they pay the costs for everybody else's benefit. That's not right. That's not fair.

Okay, Mr. Gillmor's question was hypothecated that we only had so much money to go around, so that was a very practical reason to even have the discussion—money, dollars. It shouldn't be about that.

What we should be doing is reaching out to groups like that and the railroads, which have a very similar kindred situation—they go back 150 years too—that kind of situation, and do what we can for them to make sure they are equitably taken care of in this whole package.

I agree with you. There is a need to reach out and do something there if the committee has to go down that road.

Mr. CRAPO. But Superfund Reform '95 doesn't represent the entire mining industry, does it?

Mr. BAKER. Mr. Crapo, I can only tell you for a fact that the Mining Association is our member and to the extent that they represent people in the mining industry, that's fine.

Mr. CRAPO. Could you tell me whether they agree with supporting excluding single party sites from retroactive liability?

Mr. BAKER. I tend to think that they would have problems of the nature that you are discussing right here.

Mr. CRAPO. That is what I would tend to think too.

Mr. BAKER. Yes, I am agreeing with you. That's why I say if you made the decision that you wanted to use what moneys you had, okay, to reach out for the most liability reform, most parties out, most litigation and transaction costs—and if you decide—that's not

my decision—if you did, what would we have to do to make sure equity and fairness was done for your constituents?

You bet we'd support making sure they were taken care of.

Mr. CRAPO. Thank you, and I guess the real, the bottom line question here is just one of basic principle, and that is do we want to create winners and losers or do we want to try to find a way that we across the board find a solution for all parties?

Mr. BAKER. I'll agree with you. I mean you're making the right case, the right arguments. It's a legitimate problem, but as long as dollars drive the solution, we have that problem. We have put together a funding scheme to make sure you didn't have to, we believe, so we'll work with you on that if you decide to go down that road.

Mr. CRAPO. All right. Mr. Burt, did you have a comment?

Mr. BURT. Yes, thank you. I agree with you 100 percent that there is no—maybe you didn't say this—but I think you were implying it, so maybe I am not agreeing with you, but I certainly feel there is no justification for putting single party sites on a basis different than multiparty sites and I would think that if we have to choose between the funds that the way to do it is to reduce the percentage as opposed to, as you say, making winners and losers.

Mr. CRAPO. Well, let me also ask, and again any member of the panel who has an opinion on this is certainly welcome to answer, one suggestion made by one of the Members of Congress who testified at the beginning of the day was that perhaps we are not giving due credit to the kind of savings that this bill is going to generate.

Is there any thought by members of the panel on that issue? Mr. Baker?

Mr. BAKER. I think many of the wonderful provisions in the bill do create more savings than you are giving yourself credit for.

We have talked about you have a very good provision which we support about not letting the liability provision benefits be enjoyed by people who have been proven to have violated the law, criminal, civil, et cetera, but in our view you haven't taken the dollar credit for it in the bill.

I don't think you have taken enough credit with respect to the reforms you make in the EPA. That is within your control as the people who write the bill to go we're going to do this and we're going to do that and we're going to do the other thing, but we are not going to do these other 15, 20, 30 things which they waste money on now.

If you permit EPA to have 1,000 FTE's paid for under the response and cleanup budgets under Superfund, I think you are making a big mistake, but that is your business and not ours. We have recommended that to you.

Mr. OXLEY. The gentleman's time has expired and we again thank this panel for what has been most helpful testimony and answers to our questions and again we apologize for the lateness of this but at least you are not Panel 5 or Panel 6.

I would like to introduce our patient fifth panel. First, Karen Florini, Esquire, from the Environmental Defense Funds; second, Mr. Richard F. Engel, Deputy Attorney General representing the National Association of Attorneys General. He is from the State of New Jersey. Mr. Langdon Marsh, Director of the Oregon Depart-

ment of the Environmental Quality, and finally Ms. Frances Dunham, Citizens Against Toxic Contamination from Gulf Breeze, Florida.

We thank you all for your patience in this very long day. As I told the other panel, at least you're not the last panel.

Some of you have come from a long distance, so we truly appreciate your willingness to testify today.

We begin with you, Ms. Florini.

STATEMENTS OF KAREN FLORINI, ENVIRONMENTAL DEFENSE FUND; RICHARD F. ENGEL, DEPUTY ATTORNEY GENERAL, NJ., ON BEHALF OF NATIONAL ASSOCIATION OF ATTORNEYS GENERAL; LANGDON MARSH, DIRECTOR, OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY; AND FRANCES DUNHAM, CITIZENS AGAINST TOXIC EXPOSURE

Ms. FLORINI. Thank you, Mr. Chairman. While the Environmental Defense Fund believes that Superfund can be significantly improved, our view of the bill, H.R. 2500, has led us to conclude that, as written, ROSA would move America in a fundamentally wrong direction in many critical areas.

Among the bill's most glaring problems are provisions that would inappropriately divert funds from actual clean-ups to polluter rebates that would weaken clean-up standards, that would undercut community participation, and that would amount to the Superfund slow-down act of 1995.

First, our problems with liability and funding. EDF is pleased that the bill maintains the basic structure of the polluter-pays liability system, a system which provides not only a stable source of funds, but also critically important incentives for clean-up at tens of thousands of non-Superfund sites around the country.

Comments on the chairman's outline submitted by the State of Ohio actually urge preservation of retroactive liability because of its incentives in such contexts.

We also support creation of a fair-share allocation system, but we strongly oppose diverting hundreds of millions of dollars annually away from clean-up and to polluter rebates, particularly given that there are no provisions insuring that those rebates do not dwarf clean-up expenditures.

We strongly oppose any provisions under which clean-up funding shrinks as compared to historical levels.

With regard to the bill's clean-up standards, we also oppose preemptings, more stringent State and local standards. This is a profound and insupportable departure from a long tradition of upholding States' rights to impose more stringent standards where needed to safeguard their citizens and their resources.

It is ironic in the extreme that such a proposal emerges from this Congress which has, at least rhetorically, taken such a strong stance on empowerment of States.

Preemption is all the more objectionable because the bill's standards undercut protection of human health. This would result from the use of the most plausible estimates in conjunction—most plausible assumptions in conjunction with central estimates in a manner that will undercut protection of sensitive subpopulations.

Equally troublesome is the bill's provision that only some environmental risks count. Under the bill, a remedy that seeks to protect the environment will be overturned by the courts unless EPA has assembled enough evidence to demonstrate that resources protected by the remedy are necessary to the sustainability of a significant ecosystem.

Ecology is too young a science to handle so great a burden. One of the world's most renowned biologists, E.O. Wilson, estimates that scientists have identified, at most, 10 percent of the species that exist on this planet.

He also notes, "Of those already discovered, over 99 percent are known only by a scientific name, a handful of specimens in museum, and a few scraps of anatomical description in scientific journals."

We know next to nothing of these species' role in the ecosystems in which they live, and so under this bill we will write off resources, not because we can confidently ascertain that they are unnecessary to the sustainability of a significant ecosystem, but merely because of ignorance.

Finally, the bill could routinely allow creation of dead zones in lieu of restoration of land to productive use. For example, ROSA authorizes use of institutional controls, including hazardous substances, easements, restricting land and water use.

It also calls for use of the most cost-effective remedy that will protect health and environment as misdefined by the bill.

But when will anything other than an easement, maybe along with paving the site, ever be adopted in lieu of the more expensive task of making sites and groundwater available for productive use in accordance with community land use and water use objectives.

All of these flaws are exacerbated by a provision that no remedy can be selected absent of a finding that it is justified under a cost-benefit analysis.

This approach effectively demands that value judgments be justified in monetary terms, otherwise, how is EPA to show in the inevitable litigation that it did not act arbitrarily in adopting a remedy that produces however many benefits and costs how ever many dollars?

Cost-benefit analysis can be, and often is, a useful decision tool, but it is not suitable for use as a decision rule.

With regard to community participation, ROSA continues Superfund's too-little/too-late tradition and indeed worsens it.

Citizens could be left out of clean-up decisionmaking in delegated States. These problems exist not only with regard to the Superfund program itself, but also with regard to the proposed voluntary clean-up programs and in the proposed changes to the Resource Conservation and Recovery Act.

As you will gather, we regard the current version of ROSA as seriously flawed. We believe you should go back to the drawing board to develop a bill that will improve clean-ups and give communities a central role in determining what is to happen to their citizens, their environment, and their land and water resources. We will be more than happy to work with you in such an endeavor.

[The prepared statement of Karen Florini follows:]

PREPARED STATEMENT OF KAREN FLORINI, SENIOR ATTORNEY, ENVIRONMENTAL DEFENSE FUND

On behalf of the Environmental Defense Fund (EDF) and its more than 300,000 members, I appreciate this opportunity to present EDF's views on H.R. 2500, the Reform of Superfund Act of 1995 (ROSA), amending the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)—commonly known as Superfund.[1] My name is Karen Florini and I am the Chair of EDF's Environmental Health Program. EDF has been actively involved in the Superfund reauthorization process during this Congress and prior ones, and served on EPA's NACEPT Committee on Superfund and on the National Commission on Superfund.

While EDF supports an improved Superfund program, we do not believe that ROSA would in fact result in improvements. Instead, it would inappropriately divert funds from actual cleanup to polluter rebates, would produce remedies that are cheap in both senses of the word (low worth as well as low cost) and that undercut community participation, and would massively slow down this already too-slow program. Accordingly, EDF strongly opposes ROSA.[2] Some of our key concerns are laid out below, beginning with liability and funding issues, then moving to cleanup standards, community participation, pace of cleanup, and changes to the Resource Conservation and Recovery Act (RCRA).[3]

I. LIABILITY/FUNDING ISSUES

A. Polluter Rebates

One of the central features of H.R. 2500 is its provision for a 50% rebate on all future expenditures made by polluters in cleaning up messes made prior to 1987. Because of the way the bill's funding provisions are structured, these moneys will compete on a dollar-for-dollar basis against actual cleanup funds. Indeed, it appears that the polluter rebates would get "first dibs" on available funds—potentially draining the program and limiting or possibly even precluding cleanup activities.

This problem arises because of the way the bill's funding provisions are structured, in conjunction with the liability provisions. In effect, from now on, each time polluters spend a dollar cleaning up a pre-1987 site, EPA will have to write them a check for 50 cents (ROSA section 201(a), adding CERCLA § 112(g)(1)). This is an apparent attempt to deal with the supposed "unfairness" of so-called retroactive liability. But even on those terms, the use of a 1987 cutoff makes no sense: how can liability for events occurring *up to 6 years after* Superfund's enactment in 1980 even theoretically be "retroactive"? The only evident rationale lies not in public policy principles, but in insurance policy language—namely the fact that insurance companies didn't get around to strengthening their "pollution exclusion" clause until 1986. Diverting scarce cleanup funds for an insurance-company bailout is unacceptable corporate welfare.

More broadly, the key question is whether the responsibility for cleaning up sites that are *now* posing a hazard should be borne by those whose actions at whatever date created those hazards, or by the public at large. Every dollar spent on polluter rebate is a dollar not spent on community cleanups. And the way the program is structured, rebates get first "dibs" on the pot of money that has to pay for all EPA cleanups as well.

While the polluter-rebate provision is apparently designed to alleviate the "unfairness" of so-called retroactive liability, the only meaningful question is "unfair compared to what," given that contaminated sites now exist. Either the polluter pays, or the public pays—directly, if cleanups are financed by tax revenues, or indirectly,

[1] This testimony refers to the text of the October 12, 1995, pre-introduction draft. It is our understanding that only minor technical changes were made before ROSA was introduced on October 18. Printed copies of the introduced bill were not available when this testimony was being prepared.

[2] There are certain elements we do support. For example, we support the dropping of the matching-funds requirements for recipients of Technical Assistance Grants [ROSA section 103, amending CERCLA § 117(e)(2)).

[3] This testimony is by no means exhaustive. For example, EDF also has serious concerns about the Natural Resource Damages provisions in Title IV of ROSA; those concerns will be set forth in testimony to be submitted separately. We also oppose ROSA's de facto unfunded mandate: ROSA's provision that no sites may be added to the NPL after 2002 and that only 125 sites may be added prior to that time (ROSA section 502(a), adding CERCLA § 105(h)(1)). Many more than an additional 125 NPL-caliber sites now exist; precluding their addition to the NPL merely means that the states will have to clean them up with their own resources—if they have any available for the purpose. In addition, we believe some elements of Title III are inappropriate, particularly section 304 (adding CERCLA § 114(e)).

through impaired health and lower property values if cleanups are too little or too late. There are no other options.

Superfund's retroactive liability provisions basically place liability on entities that caused and contributed to the problem. In most instances, those entities benefitted economically from getting rid of hazardous substances in a way that eventually gave rise to a Superfund site. In effect, Superfund simply requires that those disposal costs be "internalized," albeit imperfectly across the intervening years. The fact that prior laws were inadequate to ensure proper disposal (as indeed existing ones are) is not relevant in determining who should pay for cleaning up teday.

Moreover, providing rebates for *future* expenditures is simply unfair to entities that have stepped up to the plate to meet their financial responsibilities under Superfund over the past 15 years.[4] Additionally, any program to reimburse pre-ROSA expenditures would result in a morass of litigation over amounts due to each of the thousands of potentially responsible parties (PRP's) at the hundreds of sites at issue. Such a program would trigger an avalanche of new litigation between PRP's and their insurers over who is entitled to which portion of the reimbursement—a giant step away from the objective of reducing litigation associated with the program.

In addition, the structure of H.R. 2500's polluter-rebate provision is particularly pernicious. Specifically, section 1001 of ROSA (amending CERCLA § 111(a)(1)) provides that Superfund's chief revenue sources—namely the roughly $1.5 billion brought in annually by the dedicated taxes on chemical feedstocks and petroleum,[5] and by the Corporate Environmental Income Tax, along with accumulated interest—may be used "only" to the purposes specified in amended section 111(b) of CERCLA. Those purposes include, among others, the polluter rebates; cleanup costs incurred by EPA, delegated states, and private parties; and payment of costs and reimbursements relating to all of the dozen or so liability exemptions for various categories of sites and parties.

The bill also at least implicitly provides that the polluter rebates get "first dibs" on those funds, since section 201(b) of ROSA (adding CERCLA § 112(i)) specifies that rebates "*shall* be made upon receipt by the President of an application from the person requesting [the rebate]." The President is also required to implement procedures for making the rebates available "in an expeditious manner."

Meanwhile, conspicuous by its absence is any language stating that EPA may decline to pay even a single rebate application on the ground that the available funds are needed to pay for cleanup costs instead. Indeed, while the bill authorizes EPA to spend monies for those purposes, it does not require the agency to spend a dime on actual cleanup. The bill as written invites litigation from polluters demanding that their rebates be allowed to trump other expenditures authorized by revised section 111(b).[6]

In addition, important activities are excluded from section 111(b) altogether, and relegated to the far-fewer-dollars realm of section 111(c)—which is financed merely from general revenues (authorized up to $250 million, see ROSA section 1002(a), amending CERCLA 111(p)(1), but with actual levels highly uncertain); cost-recovery actions[7] and fines; and transfers from other federal agencies (authorized up to $200 million, see ROSA section 1003, adding CERCLA § 111(q), again with actual levels highly uncertain). Among other activities, section 111(c) encompasses all EPA investigation and enforcement efforts—including EPA's compilation of the preliminary list of PRPs, which is the first step in the liability-allocation process. In turn, that process must be completed before EPA can issue cleanup orders (see ROSA section 207, adding CERCLA § 127(b)(4)). If EPA lacks resources to conduct investigations, allocations won't go forward, and neither will cleanups.

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[4] While those entities theoretically could be reimbursed, ROSA does not provide for doing so, nor are there funds available for doing so.

[5] Curiously, ROSA section 1011 extends the corporate environmental income tax and the petroleum tax, but apparently *not* the chemical tax. It has been reported that this was an inadvertent oversight.

[6] Potentially, site-specific cleanup of a delegated state may also get "first dibs" status, since ROSA section 501(a) (adding CERCLA § 131(d)(1)) provides that "the cost to a State of exercising any delegated authorities shall be funded as such costs arise, where such costs may be determined on a site-specific basis."

[7] Cost recovery actions are unlikely to provide substantial revenue under ROSA, since the state delegation program allows states to take on response actions independent of cost recovery (see ROSA section 501, adding CERCLA § 131(a)(1)). Because recovered funds will be deposited to the general Superfund, States will have little motivation to compile adequate documentation that would enable EPA to conduct cost-recovery actions. And, because ROSA precludes EPA from imposing any terms on states, the agency will be unable to require adequate documentation as a condition of delegation. ROSA section 501, adding CERCLA § 131(a)(2)(B).

The issue is of great concern because ROSA allows PRPs to demand an allocation at the vast majority of sites: all those involving 2 or more PRPs where the cleanup costs exceed $1 million, or where a Fund-reimbursable share exists due to one of the liability carve-outs provided by ROSA (section 203(a), adding CERCLA § 107(n).[8] These include not just the 1,300 sites in the National Priorities List (NPL) that are commonly referred to as "Superfund sites," but also short-term and emergency removals. There have been more than 4,000 such removals to date at both NPL and non-NPL sites (some sites have more than one removal). In short, EPA's allocation workload will be immense, particularly for the backlog of existing sites.

In addition, the funding scheme relegates other important components of the Superfund program to second-class, under-funded status under section 111(c). Notably, these include the technical assistance grants, which are vital in allowing communities to play a meaningful role in the cleanup decision making process (ROSA section 1001(a), amending CERCLA § 111(c)(4)).[9] Also included are health assessments, health services, and other activities of the Agency for Toxic Substances and Disease Registry (ATSDR) (§ 111(c)(6)), research and development into improve remediation technologies (§ 111(c)(9)), and EPA overhead (§ 111(c)(2)), among others. Given the limited funds made available for these activities (ROSA section 1001(a), amending CERCLA § 111(a)(2)), many of these critical functions will end up grossly under-funded.

B. Allocation Process[10]

EDF supports creation of an allocation process, conducted by an independent neutral third party, for determining each party's share of liability, but we have several concerns about the details of the process set forth in ROSA section 207 (adding CERCLA 128(c)). One relates to the structure of the cash-out option made available to polluters after the allocation is completed. Specifically, ROSA provides that, within 90 days after an allocation is made, a party to the allocation can offer to settle for its allocated share, either via a "cash out" or by agreeing to perform the response action (ROSA section 207, adding CERCLA § 128(q)).

But it is far from clear whether EPA has authority to include in a cash-out settlement any "premium" for risk of remedy failure (ROSA section 207, adding CERCLA § 128(q)).[11] Although that section cross-references the covenant-not-to-sue provisions of section 122(f), which *do call for such a premium* (see ROSA section 213), section 128(q) does not expressly provide for a remedy-failure premium where there is cash-out following an allocation. Particularly in light of the bill's emphasis on failure-prone remedies such as institutional controls, engineering controls, and natural attenuation rather than actual treatment, this leaves the Fund without recourse if a remedy fails. In addition, the bill is silent as to what happens if the remedy has not yet been selected by the end of the allocation process. Does EPA simply guess how much the not-yet-selected remedy will cost, and provide cash-outs on that basis? If EPA underestimates the cost, the Fund again comes up short.

II. CLEANUP ISSUES

Our strong concerns about ROSA's liability and funding provisions are paralleled with regard to the bill's cleanup provisions.

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[8] The only exceptions are the few instances where, prior to ROSA, a final settlement or order has been adopted that resolves the liability of *all* PRPs. ROSA section 207, adding CERCLA § 128(a)(3).

[9] As discussed below, ROSA undercuts meaningful community participation for a number of additional reasons.

[10] In addition to problems discussed in the text, we question the appropriateness of granting essentially unlimited discretion to the allocator (§ 127(j)(10), who is a private party not accountable to any elected official and who is selected by PRPs with no public participation. This creates an incentive (and opportunity) to forum-shop for an allocator who is inclined to place much of the financial burden on the Fund (e.g., by allocating liberally to PRPs that are statutorily exempted by CERCLA § 107(n), as added by ROSA 203(a)), thus depleting the Fund. These concerns are heightened by the fact that the allocator may use not only the statutorily delineated factors, but also "such other equitable factors as the allocator determines are appropriate), in conjunction with the bar on limiting the allocator's discretion in any way (§ 127(u)). In addition, the government may reject the allocation only by meeting a high-threshold determination that "no reasonable interpretation of the facts" supports the allocation made, or that the allocation "was directly and substantially affected by bias, procedural error, fraud, or unlawful conduct" (ROSA section 207, adding CERCLA § 128(o)).

[11] Such a premium is an increase in the payment designed to compensate for the fact that the cleanup may cost more to complete than anticipated.

A. Inadequate Cleanups

Superfund's objective of protecting human health and the environment actually encompasses three distinct components: protection of human health; protection of nonhuman biota; and protection of resources, most notably land and water. ROSA fails to do an adequate job on the first two, but the bill's most conspicuous flaw is its provisions that tilt heavily against making land and water resources available for beneficial use. As currently structured, the Superfund program—at a total cost of less than 0.1% of our annual Gross Domestic Product[12]—strives to accomplish the third goal as well. As explained below, ROSA would effectively abandon the effort to restore land and water resources as part of cleanup. All of these concerns are greatly exacerbated by the fact that ROSA expressly preempts all other federal and state environmental standards (ROSA section 101, amending CERCLA § 121(1))—even state standards to apply specifically to cleanups.[13]

1. *Land and Water Resources:* As structured, ROSA fails to provide that communities make land-use and water-use determinations *before* cost is considered. It also very narrowly defines "protection of the environment" in a way that largely excludes consideration of the resource value of land and water. These two features, in conjunction with the bill's requirement to use the "most cost-effective" way to protect health. Moreover, the bill provides that institutional and engineering controls (such as restrictive easements and containment) and "natural attenuation" are "on an equal basis with all other remedial action alternatives" (ROSA section 102, amending CERCLA § 121(c)). But even assuming that these techniques serve to obviate human exposure,[14] they will leave communities with permanent dead zones that cannot be redeveloped. Similarly, where alternative water supplies are used instead of cleaning up groundwater—are at least keeping contamination from spreading—inadequate water supplies in the future may come to constrain future economic growth.

Significantly, ROSA specifies that environmental risks are covered only if they are "risks to ecological resources that are necessary to the sustainability of a significant ecosystem and will not interfere with a sustainable functional ecosystem" (ROSA section 102, amending CERCLA § 121(b)(4)). Whatever that far-from-transparent phrase means, it apparently excludes groundwater and useable land in and of themselves—they are protected *only* if essential to a significant ecosystem.

Even leaving aside the difficulty of determining which ecosystems are significant and which are not, let us assume that many urban sites will not meet this criterion. Because excluding people by fencing and perhaps paving sites will generally be far cheaper than actually cleaning them up enough to allow productive use, *Title I of ROSA is a recipe for creation of dead zones*—a result fundamentally at odds with the purposes of Titles III and IX of the same bill, to "return[] contaminated sites to economically productive or other beneficial uses" (ROSA section 301(b)(2); ROSA section 901, adding RCRA section 12001(2)).

Moreover, potential future land and water uses are considered only if they have "a substantial probability of occurring" (ROSA section 102, amending CERCLA § 121(D)(1)). That difficult standard completely ignores the fact that land and water use patterns change in ways that are often hard to predict, especially from a distance of a decade or more. Indeed, significant portions of the country experienced more than 25% population growth in their metropolitan areas *in the single decade following Superfund's enactment in 1980.*[15] And redevelopment often occurs in ways that may not be easily anticipated. Who would have envisioned housing on the site of the old Denver airport, or rapid redevelopment for residential use of formerly in-

[12] The GDP in 1993 was $6.4 trillion. Probst et al. estimate that "annual spending in the United States pursuant to Superfund is about $6 billion, including expenditures by all parts of the federal government, and all spending by private parties for cleanup, Superfund taxes, and transaction costs. Katherine N. Probst, Don Fullerton, Robert E. Litan, Paul Portney (1995). Footing the Bill for Superfund Cleanups. Washington, DC: Brookings Institution and Resources for the Future.

[13] There is an "exception" for certain land-disposal standards if the State pays for their implementation (ROSA section 101, amending CERCLA § 121(m)).

[14] This assumption is itself questionable. Engineering controls can fail: fences can fall down, fallible human beings can disregard institutional controls (as, for example, the Niagara School Board disregarded the "do not excavate" notice in the deed by which Hooker Chemical conveyed Love Canal to the township of Niagara). Similarly, if natural attenuation works, why does groundwater contamination still exist at so many decades-old sites?

[15] EDF addressed this issue in detail in our June 21, 1995, testimony on Superfund Reauthorization before the House Committee on Transportation and Infrastructure's Subcommittee on Water Resources and the Environment.

dustrial properties in Minneapolis? But recent newspapers have carried reports that both are occurring today.[16]

The difficulty of accurately predicting land use means that, far from considering only those uses with "a substantial probability of occurring," a converse burden should be applied: namely, that cleanups should routinely seek to make sites available for unrestricted (residential) land use, unless the proponent of a less-stringent cleanup can demonstrate that such a use is implausible.

Equally troubling is the lack of any explicit objective of either restoring contaminated groundwater to useable condition or of preserving uncontaminated groundwater to the greatest extent technically and economically practicable. Again, only groundwater deemed "necessary to the functioning of a significant ecosystem" is protected under the "environmental risks" provision. But most groundwater—including many important aquifers—do not fall into that category. The bill's remaining objective of protecting health will, once again, generally be met most "cost-effectively" by avoiding ingestion of that water. Indeed, the bill expressly states that provision of alternative water supplies is one of the allowable methods for achieving protection.

2. Ecosystems: More generally, the bill's exclusive focus on protecting only those resources "necessary to the functioning of a significant ecosystem" creates a scientifically unworkable standard—particularly where, as here, such determinations will be subject to litigation. The science of ecology cannot now delineate which resources are, and which are not, "necessary" to ecosystem function. Equally problematic is the task of determining which ecosystems are "significant." As structured, the bill puts on the government the burden of compiling an administrative record showing that this standard is met. That burden is likely to prove unmanageable in many instances, not only because of current limits of scientific knowledge. Indeed, scientists estimate that they have identified *at most* 10% of the species found in the earth's ecosystems.[17]

In short, the current state of scientific knowledge simply cannot support the evidentiary determinations this bill demands. As a result, resources will be written off during Superfund cleanups not because they truly lack value, but because there is not enough evidence to prove their significance. Instead of this unacceptable outcome, ROSA should at least insist that *cleanups* protect resources unless it is demonstrated that a particular resource is unnecessary to the functioning of a significant ecosystem, or that the ecosystem in question is insignificant.

3. *Protection of Health.* ROSA's provisions regarding health protection are similarly flawed, particularly some of the risk-assessment provisions.[18] These include the requirement to use *"the most* plausible assumptions" for risk assessments (ROSA section 102, amending CERCLA § 121(b)(4)), a phrase which implicitly disallows consideration of atypically sensitive subpopulations (e.g., developing fetuses, infants, children, asthmatics, the elderly). Although the bill provides that EPA is to "specify" the population that is the subject of the risk estimate (ROSA section 101, adding CERCLA § 127(c)(4)), that language is far from clearly authorizing—and assuredly fails to require—consideration of sensitive subpopulations.

Perhaps the most glaring weakness is the bill's utter failure to recognize the limitations of risk assessment when dealing with incomplete data: a situation far more prevalent than not. There is nothing about protecting health where incomplete data creates uncertainties.

In addition, the bill expressly requires that risk assessments use exposure estimates based on "the final 90th percentile of the exposure probability distribution." (ROSA section 102, amending CERCLA § 121(b)(4).) As the following diagram shows, use of the final 90th percentile of the exposure probability distribution can lead to results that disregard realistic high-end exposures. Typically, exposure dis-

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[16] In addition, the bill inexplicably provides that, where "hazardous substance easements" are used in order to restrict future land and water uses, those easements have a duration of only 20 years; thereafter, the easement "may" be renewed (ROSA section 113, adding CERCLA § 104(k)(3)). If such easements are to be utilized, they must remain in effect until and unless the residual contamination is actually addressed—not simply until the easement expires after an arbitrary time period lapses. In addition, EDF is deeply skeptical about the reliability of a system that depends on putting easements on file with federal district courts in states that lack deed registries (id. § 104(k)(6)); such a system seems almost guaranteed to be ineffective.

[17] Edward O. Wilson (1992). *The Diversity of Life.* Cambridge, MA: Harvard University Press. Page 132. Professor Wilson goes on to note "And of those already discovered, over 99% are known only by a scientific name, a handful of specimens in a museum, and a few scraps of anatomical description in scientific journal." We know next to nothing of their role in the ecosystems in which they live.

[18] While many of these provisions were found in H.R. 4916 as well, they were acceptable in the context of other provisions of that bill—but which are conspicuously lacking from ROSA (see, e.g., provisions described in note 19).

tributions are not a true bell curve, but instead are log-normal: when graphed, they look like a misshapen bell with a long right tail because some people have much-greater-than-average exposures. for such data, it is scientifically unsound to use an approach that disregards the top 10% of the exposure probability distribution.[19]

If the Committee's concern is that risk assessments avoid use of implausible exposure assumptions (or the compounding of plausible assumptions in an implausible manner), then the Committee ought to say so directly. It should not, however, adopt an arbitrary and scientifically insupportable approach such as requiring use of the 90th percentile of the final exposure distribution.

Finally, the bill provides that a remedy suffices to protect health with regard to carcinogens if it "limits cumulative, lifetime additional cancer risk from exposure to hazardous substances from releases at the facility to within the range of one in 10,000 to one in 1,000,000 for the affected population." (ROSA section 102, amending CERCLA § 121(b)(3).) It is not clear whether this risk range applies to *overall* risk from all of the carcinogens released by the facility, or on a carcinogen-by-carcinogen basis. In any event, given the requirement to use "cost-effective" remedies, and given that it is always cheaper to be less rather than more protective, it appears that the upper limit (1 in 10,000) will always be controlling.

B. The Role of Cost and Cost/Benefit Analysis

As the preceding testimony makes clear, EDF is not indifferent to the role of cost in cleanup decisionmaking, but this bill makes cost a determinative factor. How? By providing that no remedy can be adopted absent a certification—which can be challenged in court—that "the incremental cost of the chosen alternative is justified and reasonably related to the incremental risk reduction benefits of the remedy" (ROSA section 102, amending CERCLA § 121(f)(2)). The bill also demands that those incremental costs and risk reduction benefits be "quantified to the maximum extent practicable" and determined on a net present value basis "to the extent feasible," and that a preference be given to "the most cost-effective" option.[20]

This is a dramatically different approach than the one taken in last year's consensus bill, H.R. 4916, which was supported by parties ranging from EDF to the Chemical Manufacturers Association. That bill amended CERCLA section 121(b)(1) to specify that the cleanups are to protect health and the environment (without narrowly limiting "environment," as does H.R. 2500), and provide long-term reliability at reasonable cost."[21]

The difference essentially is one of the burden of proof. Is the starting assumption that restoring land and water to beneficial use, and protecting health, are worthy social goals that are to be attained absent a finding that doing so in a particular instance is unreasonably costly? Or are these goals to be met only where an affirmative cost/benefit finding can be made? Given the profound limitations of cost/benefit analysis—especially as applied in circumstances involving the inevitable and substantial uncertainties about future land and water use patterns, and the grossly incomplete state of human knowledge about the effects of most toxicants on humans and ecosystems—such an approach is fundamentally bad public policy.

III. COMMUNITY PARTICIPATION AND STATE ROLES

Several features of ROSA gravely undercut effective community participation in the cleanup decisionmaking process. For example, only elected officials—not the community as a whole—get to have their views "considered" in remedy selection (ROSA section 102, amending CERCLA § 121(f)(1)(D)). In addition, a State or locality can veto addition of a site (ROSA section 502, adding CERCLA § 105(h)(3)), regardless of the severity of the risk posed by the site and whether there is any alternative state or local program under which it will be cleaned up. No reason need be given for barring a listing—a local official could simply block a listing if he or she, or a friend, colleague, or family member, would be a PRP.

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[19] It is not clear whether the 90th percentile is intended to mean the estimated exposure below which 90% of the population falls, or 90% of the estimated maximum exposure. Both interpretations are unprotective when dealing with log-normally distributed data.

[20] What's more, the requirement to calculate cleanup benefits on a net present value basis (§ 121(f)(2) means that the costs of having to provide alternative water supplies in the future will probably be discounted—tilting the scales against current expenditure to protect those future uses.

[21] Section 502, Superfund Reform Act of 1994 (amending CERCLA § 121(b)(1), H.R. 4916, 103d Cong., 2d Sess. Significantly, the bill also expressly provided a preference for treatment of hot spots (ibid), provided that "substantial weight" be given any consensus recommendation as to anticipated land use by the Community working Group (§ 121(b)(2)(B)), and specified that "a goal of this Act is to restore any contaminated ground water and surface water that may be used for drinking water." All three of those features are absent from ROSA.

In addition, as discussed below, Superfund cleanups can be partly or wholly delegated to the States, regardless of a State's past record on public participation (or any other factor).

More generally, the bill's community participation provisions have four fundamental flaws. First, the bill fails to provide citizens with a meaningful right to participate in the Superfund investigation and cleanup process. Under current law, citizen participation in the cleanup process is not mandated to occur until after EPA has selected a proposed cleanup plan—well after critical and often irreversible cleanup decisions are made. Affected citizens have long complained that the current law denies them a meaningful opportunity to participate in the cleanup process and that the law should be changed to confer on EPA a nondiscretionary obligation to foster community participation in the process at all significant points in the cleanup process.

In particular, section 117 should be amended to require EPA to provide reasonable public notice and a public hearing (if requested) before the performance of each of the following: (1) undertaking the health assessment, preliminary assessment and site investigation; (2) undertaking the remedial investigation and feasibility study; (3) completing the facility work plan: (4) announcing the preferred remedial alternative; and (5) any time an EPA official with authority to make significant decisions meets with anyone else who would be affected by the decision and the subject of the meeting involves identification, investigation, or remedial activities at the site on the NPL.

ROSA fails to amend section 117 to provide for an enforceable right to participate for those most critically affected by cleanup decisions. Without such a provision, EPA's general nondiscretionary duty to inform the public (ROSA section 103, amending CERCLA § 117(f)) is essentially meaningless.

Second, although ROSA does rectify some of the current limitations in the Technical Assistance Grants (TAG) program, EDF strongly opposes limiting eligible TAG recipients to the Community Assistance Group where such a group exists (ROSA section 104, adding CERCLA § 117(g)(6)). The TAG program provides affected community members with access to technical resources to assist in interpreting the often highly complicated and technical information involved in cleanup decisions. But under ROSA, members of Community Assistance Groups will include many parties whose health is not at stake in the cleanup—most notably PRPs; indeed, up to half the Group may be comprised of people who are *not* local residents (ROSA section 104, adding CERCLA § 117(g)(4). But it is people who live at or near the site—not the PRPs, local businesses, or even local governments—who will have to live with the health consequences of those decisions. By requiring that TAGs be awarded to Community Assistance Groups, the individuals with the most to lose from inadequate or erroneous cleanup decisions will have to share the limited TAG resources with those who bear responsibility for creating the Superfund site in their community. This makes no sense.

Third, while EDF supports the creation of small, community-level working groups to provide an ongoing forum for diverse interests at a Superfund site to come to consensus on cleanup decisions wherever possible, as proposed by ROSA, the CAG's could actually undercut community interests, especially as they relate to land use. While EDF believes that land use factors are relevant to site cleanup decisions, EDF strongly believes that the adversely affected community members should determine the future use of any Superfund parcel in their community. Even aside from the obvious conflict-of-interest problems, land use decisions should not be made by PRPs, but rather by community members—again, those who will have to live with those decisions on a day-to-day basis.

Indeed, under ROSA, the views of the Community Assistance Group on land and water use are not binding; even consensus views are given no special weight (ROSA section 104, adding CERCLA § 117(g)(3)). This is in notable contrast to last year's consensus bill, which directed EPA to give substantial weight to a consensus recommendation or, absent a consensus, to the views of the affected community (H.R. 4916, section 502, amending CERCLA § 121(b)(2)(B)).

Fourth, ROSA does not provide for the creation of state-wide organizations to ensure wide dissemination of information about toxic sites in a community friendly manner. Despite current efforts by EPA, many affected community residents still do not receive adequate, timely information about the nature of hazardous waste sites located in their communities or about the Superfund program and their (currently limited) options for participation throughout the investigatory and cleanup process. After over a decade of ineffective public participation in the Superfund program, it is time to change business as usual by creating citizen-run state-wide organizations to ensure that those living next to or on toxic dump sites have the necessary tools at their disposal to make sound judgments about the future of their communities.

Yet another portion of ROSA—relating to state delegation—is likely to further impair effective community participation in cleanups. For example, EDF has grave concerns about the workability of dividing public participation responsibilities from cleanup responsibilities.[22] Section 501(a) of ROSA, adding CERCLA § 131(a)(1), provides that states may receive delegation of "any or all" of various elements of the Superfund program—with "community participation activities under section 117" made into a distinct element independent of remedy selection. If a State chooses to receive delegation of remedy selection but not community participation, the latter will be relegated to an after-the-fact add-on conducted by EPA—which is in turn precluded from playing any role once delegation has occurred (ROSA section 501, adding CERCLA § 131(c)(3)).

Other aspects of the state delegation process are likewise troubling. First, there is absolutely no public participation in the delegation process itself. So, even if citizens have experienced serious problems at state-conducted cleanups, there is no opportunity for them to make EPA aware of those problems. And even if EPA knew of them, the agency cannot withhold delegation on that basis. What's more, EPA is expressly precluded from placing any conditions or terms on a delegation (ROSA section 501, adding CERCLA § 131(a)(2)(B)).

Instead, for states that have received Corrective Action authority under RCRA, EPA's *sole* ground for rejecting a delegation application is that the state lacks adequate legal authority. Neither the adequacy of resources[23] nor the state's prior performance can be considered. And for both RCRA-approved states and others (i.e., states that may have little or no experience in dealing with major cleanups), applications are deemed approved unless EPA disapproves it within 60 days—an absurdly inadequate period given the massively increased workload imposed by other provisions of the bill as well as the lack of resources provided. In short, the bill elevates the form of federalism over the substance of cleanup, excluding meaningful public participation in so doing.

Finally, ROSA provides that states may delist a site "if the State has an enforceable agreement to clean up the facility" (ROSA section 501, adding CERCLA 131(b)(3)(B)). The PRPs must concur, but the public is apparently totally excluded from this process—and there is no indication as to the alternate cleanup standards, or even what constitutes "enforceability" (e.g., whether such an agreement would be citizen-enforceable under CERCLA 310).

IV. PACE OF CLEANUPS

As a result of a variety of features, ROSA will dramatically slow progress toward cleaning contaminated sites. Key reasons include the following:

First, section 115(b) of ROSA provides that existing cleanup agreements can be reopened if PRPs (or others) file a petition alleging that a $1 million cost savings is possible through selection of an alternative remedy as provided by ROSA. Given the laxity of the cleanup standards as described above, many if not most of the nearly 1000 existing agreements are likely to be subject to a petition. Petitions must be filed within 9 months of ROSA's enactment; EPA must complete review of a petition within 180 days of receiving it, and *must* revise the remedy upon finding that a $1 million savings is possible. *Critically, no mention is made of public participation in this process.*

If EPA disallows the requested revision, the petitioner can sue—a provision likely to mean hundreds of new lawsuits within months of the bill's enactment. EPA's resources will be drained both by having to respond to petitions and by having to defend such lawsuits.

Similarly, section 114 of ROSA (amending CERCLA § 113(h)) abolishes the current "cleanup now, sue later" rule—so after years of study, there could be years of litigation before a site is actually cleaned up. Even if PRPs are unable to persuade a court to hand out a preliminary injunction barring the cleanup from proceeding until the litigation is complete, this provision will massively divert EPA resources from cleanup into litigation—slowing down cleanups around the country as a result.

Yet additional slowdowns arise from the new requirement to do a cost/benefit analysis be completed before any cleanup decision can be made at a site. Such analyses are both time- and resource-intensive.

Finally, section 207 of ROSA (amending CERCLA § 127(b)(4)) expressly bars EPA from issuing cleanup orders to polluters until 90 days after the liability-allocation

[22] EDF is also skeptical that States will be motivated to compile adequate cost-recovery documentation, since cost recoveries will go to the Trust Fund as a whole rather than to the State.

[23] The fact that a state has adequate resources to deal with RCRA corrective action does not demonstrate that it *also* has adequate resources to deal with *additional* sits under Superfund.

process is complete (except for a situation "that actually presents substantial danger"). Under a best-case scenario, this will freeze EPA's cleanup order authority for the better part of 2 years.[24] Slowing down Superfund cleanups is not what this reauthorization is supposed to be about.

Moreover, as noted above, EPA may well have seriously inadequate funds to perform the initial PRP search that is the first step in the allocation process—thus delaying cleanups even further.

V. RCRA PROVISIONS

In addition to the troubling provisions of Title I regarding cleanup under Superfund, ROSA's Title IX proposes equally troubling amendments to the Resource Conservation and Recovery Act (RCRA), in the form of a new Subtitle K of RCRA. These changes would directly affect many more sites than does the Superfund program itself: in addition to the more than 4,000 RCRA "corrective action" sites,[25] they would also apply to a large but unknown number of sites where legally "hazardous" soil and groundwater is disturbed (and thus "generated" as a waste).[26]

Under ROSA, all wastes covered by a governmentally supervised "remediation action plan" would be exempted from key RCRA requirements: pre-disposal treatment of wastes (RCRA §3004(d), (e), (f), (g), and (m)); obtaining a permit for treatment, storage, or disposal facilities (RCRA §3005); and adherence to minimum-technology standards for certain landfills, incinerators, and other units (RCRA §3004(o)).

Significantly, Subtitle K does not simply tailor these existing RCRA requirements for contaminated soil and groundwater; it simply obliterates them. Instead, it calls for creation of site-specific RAPS to "protect human health and the environment against realistic risks in a cost-effective and cost-reasonable manner" using criteria largely parallel to those added by Title I of ROSA to section 121 of CERCLA (§12004). As a result, cleanup standards will be battled out anew every time a RAP is written. And that process will entail public participation procedures that are entirely inadequate, particularly for complex and controversial sites: mere notice and opportunity to comment on the proposed RAP (RCRA §12011(a)(3)).

Another key problem with Title IX is its overly broad definition of the term "remediation waste." Far from being limited to contaminated soil and groundwater, it encompasses *any* waste that is included in a remedial action plan. This definition includes even materials that are chemically and physically indistinguishable from industrial process waste—such as impoundment sludges, abandoned barrels of waste, or concentrated "hot spots" where spills occurred. As a result, they are completely exempt from all controls save those that EPA or the state decides to impose on a site-by-site basis through a RAP.

Finally, the enforcement apparatus created by Subtitle K is far weaker than exists under current law. In particular, in states with delegated programs, citizen-suit enforcement is apparently unavailable in a wide variety of circumstances (most notably involving remediation wastes at sites that are not RCRA treatment, storage, or disposal facilities).[27]

Thank you for this opportunity to present our views.

Mr. CRAPO [presiding]. Thank you, Ms. Florini.
Next, Mr. Engel?

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[24] Specifically, following a request for an allocation, EPA must prepare the preliminary list of PRP's within 6 months. The allocator prepares the final list of "allocation parties" within another 6 months, and complete the allocation report within another 6 months. EPA is barred from acting for another 3 months, for a total delay of 21 months. (In addition, if the first allocation report is rejected by the government, many additional months would be added.)

[25] At present, RCRA provides that parsons seeking a permit for a hazardous waste treatment, storage, or disposal facility must perform "corrective action," e.g., clean up releases of hazardous constituents from all waste management units at the facility (including nonhazardous waste management units) regardless of the time at which the waste was placed in the unit. RCRA 3004(u), 42 U.S.C. 6924(u).

[26] Under RCRA, contaminated soil and groundwater qualify as a hazardous waste in any of several different ways. One way is to "contain" (i.e., be mixed with) certain materials that EPA has listed as hazardous; another is to flunk one of the four tests of hazardous wastes "characteristics" that EPA has established (i.e., corrosivity, reactivity, flammability, or toxicity (this last relates only to 38 chemicals at present)).

[27] In addition, the process established for authorizing state programs shares many of the same defects as those in ROSA Title V (adding CERCLA §131), discussed below.

STATEMENT OF RICHARD F. ENGEL

Mr. ENGEL. Thank you. You know, it is interesting. The States finally have a chance to have a say because I think as several people have mentioned here, we deal on a daily basis with thousands or more sites than are dealt with on the Federal level, and therefore we feel that we have an important contribution to make to this panel and to the reform of Superfund.

One of the sites that was mentioned today was the Lipari landfill site, which is in my State. The Lipari landfill was the number one site on the entire Superfund list.

About a month ago a party was held at the Lipari landfill site because of a clean-up that had been done at that site. The mayor and other important people in the vicinity, which I include the residents as being those important people, had a chance to celebrate that they actually had their lake, which had been contaminated for many years, cleaned up so that it is useable again.

We think that this cooperative effort that resulted in this clean-up, which included the Roman Hass Company—and I was glad to see Mr. Wilson here today—was the result of the good things that are in existence in Superfund and that we would like to see kept.

Obviously, there are a lot of reforms that need to be made and we have sent a letter over on behalf of the National Association of Attorneys General yesterday to the committee asking to work with you to try to improve on the portions of the bill that we think need improvement.

Not all of them need improvement and we really are encouraged that you have been listening in the past to our concerns.

I don't want to spend a lot of time on some of the exact things that we think are wrong, but I would just like to hit a couple of high points.

We in the States are very concerned about the repeal of retroactive liability. We've been that way for many years now. We continue to believe that no one has convinced us that you can totally repeal retroactive liability.

We are encouraged by the compromise that this committee has made. I'm not sure it is perfect; I'm not sure that anybody understands the finances that have come about because of these reforms or will come about because of the reforms, but we continue to be willing to work with you, but we really would not be able to support a complete repeal of retroactive liability.

We also have some concerns about specifics with regard to the exemptions and limitations. Again, I would urge you to try to work with us because we think we have some good ideas as to how we can make this work.

We also have some concerns about the reopening of the ROD's. You know, we in the Attorneys General offices probably have more attorneys litigating these than anybody, and we don't have any budget that goes for this money either. It is as much a concern to the Attorneys General, just as it is when we were dealing with the issue of these frivolous prisoner lawsuits about where the money comes from for these.

So we would be glad to see a scheme that would save money, but we don't want to see a scheme such as we think the ROD reopening would allow for that would cost us money in the end.

We have a lot of sites that we've made a lot of progress on, particular in New Jersey, and we would hate to see it go backwards with the increase in litigation costs.

Finally, I would like to say that I really think that the allocation scheme, while it is a decent one in many respects, also seems to be one that I think is going to still lead to a lot of litigation costs, and we think that serious consideration should be given to reform that allocation scheme.

There are a lot of areas of this bill that I am not going to comment on. I know this is a liability hearing, but I do think that we have some concerns with the remedies selection portions, with the Federal facilities portions, and you will hear later today, the natural resource damage portions.

But as I said, overall, I am glad to work with you and we appreciate the opportunity, Attorney General Paritz and Commissioner Schinn and the National Association of Attorneys General, to testify today.

Thank you.

[The prepared statement of Richard F. Engel follows:]

PREPARED STATEMENT OF RICHARD F. ENGEL, DEPUTY ATTORNEY GENERAL GENERAL, STATE OF NEW JERSEY

Mr. Chairman and members of the subcommittee: Thank you for once again giving us the opportunity to testify before the Subcommittee on the vital issue of the liability provisions of H. R. 2500 (ROSA) and the reform of CERCLA. This testimony is given on behalf of New Jersey Attorney General Deborah T. Poritz, New Jersey Department of Environmental Protection Commissioner Robert C. Shinn, Jr., and the National Association of Attorneys General (NAAG), who wish to convey their thanks for your kind invitation. New Jersey, as the State with the greatest number of sites on the National Priorities List (NPL), has a particularly strong interest in this debate. In addition, Attorney General Poritz is the Vice-Chairperson of the Energy and Environment Committee of NAAG. State Attorneys General, as the States' chief legal officers, deal daily with the difficulties of proceeding in court to secure remediation of contaminated sites and the recovery of costs incurred in those cleanups.

We continue to believe that there are three groups that have the greatest stake in the outcome of this reform effort—the residents whose health is affected or threatened by these sites, the taxpayers, and the regulated community. New Jersey and NAAG feel that all three groups must be kept in mind when considering whether any reforms are fair and achieve their intended results.

Before discussing the particulars of the proposed liability provisions, however, we extend our thanks for the cooperation you and your staff have shown in listening to us. It is obvious that over the course of the debate you have taken many of our concerns, and those of other state groups, and incorporated these into this bill. Without these changes from earlier drafts, we doubt we would be able to be as positive as we are teday.

a. *Over all, the proposed reforms represents a good first step toward reforms of CERCLA.* In that spirit, New Jersoy and NAAG would like to point out what is good about this bill. For example, removing or limiting liability, with certain justified exceptions, for *de minimis* and *de micromis* generators and transporters, lenders, prospective purchasers, municipal solid waste, sewage sludge, tax exempt organizations, and the like are for the most part positive reforms. While we would like to discuss some revisions in these parts of the bill with your staff, we believe that removal or limitation of these entities from liability will substantially reduce transaction costs at those sites where they are involved, and will refocus the liability for those sites on those who are the real cause of the problems at those sites.

b. *Certain de minimis provisions need revision.* We do have a few concerns, however. ROSA would amend Section 122(g) by allowing *de minimis* status for a natural person, a small business, or a municipality that can demonstrate that it has an "inability or limited ability to pay response costs." We think that this will cause an enormous increase in transaction costs, as the thousands of entities that fall within that exemption try to demonstrate such inability or limited ability to pay. New Jer-

sey believes that a much clearer distinction, using volume, toxicity, or mobility of waste, as set out in other parts of this bill, would keep transaction costs to a minimum, and should be used here instead.

c. *Governments should not be liable due to ownership status.* We greatly appreciate your recognition that governmental entities should not be liable to the extent liability is based merely on the governmental entities' ownership of a road, or due to the granting of a license or a permit. However, as you may know from previous testimony on this issue, responsible parties have attempted to hold governmental entities liable for many other reasons we feel also are invalid. New Jersey and NAAG believe that this exemption should clarify that governmental entities are exempt from liability for inspection of facilities, direction of waste to facilities, regulation of facilities, and other governmental functions that have nothing to do with ownership of a facility or generation of waste. In addition, we believe that it is unfair to hold governmental entities liable, as some have tried to do, simply because the law of the state makes governmental entities owners of such property as streambeds and other riparian property. We therefore urge you to make it clear in this bill that governmental liability will only attach when the government acts as the owner of a facility in the traditional, entrepreneurial, sense of the term.

d. *Owners and operators, not just one or the other, should be liable.* If we are reading ROSA correctly, section 204(c) seems to amend CERCLA by significantly changing the concept of owner and operator liability. Presently, both the owner and operator of a facility are liable. However, your bill proposes to make either the owner or operator liable. This change is a major change; yet so far as we are aware, has not been the subject of any debate. We see no need to exempt one or the other of these entities. If both have something to do with the placement of hazardous substances at the facility, either by owning the facility or allowing it to be used, they should both be held responsible for remediation. If your concern is the elimination of so called "status" liability (in other words, making people liable simply because they later own a site that once was the subject of the disposal of hazardous substances), that problem can be cured in a much more precise and less drastic way. We would be happy to work with the subcommittee in suggesting language that could address your concerns in this regard.

e. *The exemption from liability for municipal landfills is too broad.* Section 203 of the Bill proposes to exempt so called municipal landfills from liability by providing that no person shall be liable due to a release or threatened release of a hazardous substance from a facility that as of June 15, 1995, was on the NPL, and on or before that date was authorized to accept, and did accept for disposal, household waste. While New Jersey supports the concept of exempting true municipal landfills from the NPL, the way this bill is now written it would exempt any landfill that even accepted one load of household waste, even if it was used almost exclusively for industrial or commercial waste disposal. In New Jersey we have 51 sites that were authorized to accept both industrial and household waste, but primarily contain industrial waste. We would like to work with you to revise the Bill so that only true "municipal" landfills are exempt.

As you can see, these problems are not major, and we believe we can help you fix them. However, we do have other areas of concern. Attorneys General are as familiar as anyone with the transaction costs of CERCLA. It is our staffs, after all, who are tied up in negotiations and in court in an attempt to have responsible parties remediate, or pay for the remediation of, these sites. Accordingly, we share your concern that neither the private nor public sector should be forced to expend scarce financial resources on litigation that would be more beneficially spent on cleanups. But as onerous as some of the provisions of the existing law are, there are other provisions that have prevented even more transaction costs which this bill will eliminate.

f. *ROD Challenges should come after cleanup; otherwise, transaction costs will increase.* The most obvious reform in this regard that you propose would allow a challenge to a Record of Decision (ROD) at any time, as opposed to the present statute which only allows challenges to a ROD after the cleanup has been completed. Let me cite an example of why this is a problem. In 1989, New Jersey negotiated a settlement with over 100 responsible parties to do the first phase of remediation at the GEMS landfill, a large landfill that accepted thousands of gallons of hazardous substances and was polluting ground water in a stream that ran right behind several housing developments. The responsible parties committed $32.5 million to put on a cap and perform other work at the site. Despite years of public meetings and other public input, which resulted in overwhelming public support for the project, just days before work was to begin at the site a small group of people who lived in the vicinity of the landfill filed suit in federal court to attempt to stop the remediation, claiming that the remediation would cause them harm. Fortunately, the federal

judge, citing section 113 of CERCLA, dismissed the suit. The remediation went on as planned, and that phase is now completed. Thousands of tests performed during remediation showed no harm to the concerned residents.

Under your bill, however, we can easily envision the opposite. All it takes is a few people to tie up a remediation in court for years. We believe that the present provisions allowing challenges only to take place after remediation is finished should be continued.

g. *Linking allocations and cleanup orders will slow the pace of cleanups.* New Jersey and NAAG also are concerned about this bill's linkage of the allocation and cleanup process by placing a moratorium on issuance of cleanup orders under section 106 of CERCLA. One of the criticisms of CERCLA has been that it slows the cleanup process. While we do not believe that the attempt to have responsible parties pay for or perform cleanups has been a significant factor in the pace of remediation, it is clear to us that the moratorium as proposed will impede the progress of cleanups. As we calculate the timeframes of ROSA, the time for issuing an order may be over one and a half years after the allocation process starts. Requiring allocations for all sites with two or more responsible parties at sites with costs over $1 million, even if the matter has been in litigation or negotiation for years, will put a halt to many cases that are about ready to settle. In fact, just this past week a major NPL site settlement was put on hold when a handful of responsible parties backed out. We expect this to happen all over the country if the allocation provisions as written are passed. We urge you to remove the prohibition on issuing orders during the allocation process.

i. *Funding issues still are not resolved by this bill.* Finally, New Jersey and NAAG feel that there still has not been an adequate showing that the combination of a retroactive liability discount, exemptions for certain entities, and limitations on liability for others, will be offset by the cost saving provisions of this bill. We truly appreciate the difficulty you have had, Mr. Chairman, in drafting a bill that attempts to balance fairness to the residents, taxpayers, and regulated community, with increases in the pace of cleanups and improvements in the cost effectiveness of such work. We especially appreciate the attempts you have made to preserve liability for past discharges. New Jersey and NAAG will not support a total repeal of retroactive liability, but we think that while this bill is a good first step in ensuring that states have an adequate level of funding necessary to perform cleanups in a cost effective way, we have not had anyone demonstrate to us that cleanups can continue at the present pace with the funds that would be available through such reforms.

States can only assume cleanup responsibilities if adequate funds are available. We have yet to see any hard evidence cited in this debate to dissuade us from our belief that these proposed changes would have a devastating financial impact upon the states. However, we would like to continue this dialogue with you on these issues, and we pledge to keep an open mind in evaluating any new information that may yet come to light and allay our serious concerns in this regard.

CONCLUSION

We have been asked to provide testimony on the liability portions of this bill, and have tried to limit our remarks to that area. This does not mean, however, that either New Jersey or NAAG agree with the rest of this bill. As with the liability provisions, we are pleased with some of your reforms, and strongly disagree with others. Attorneys General Gregoire, Poritz and Humphrey sent you a letter this week asking that the staffs of various attorneys general be allowed to work with your staff to improve this bill, and we hope that this will happen. We believe that, given the right mix of reforms, the residents, taxpayers and responsible parties we spoke of earlier will be the beneficiaries of a faster, fairer and more cost- effective Superfund law. Thank you again for permitting us to present our views to you today.

Mr. CRAPO. Thank you, Mr. Engel.

Mr. Marsh?

STATEMENT OF LANGDON MARSH

Mr. MARSH. Thank you. I would like to speak today in support of Superfund reform for the effort to try to get something done by the end of this year.

I want to put before the subcommittee the experience that we've had in Oregon with the recent law that was adopted this year with

sponsorship by the industry and support by the legislature and the Governor on a bipartisan basis.

It is very much a collaborative effort that we think will get cleaned up at a much lower cost while still protecting citizens and natural resources.

The heart of it is the need for continued protection of groundwater. Over 75 percent of Oregonians rely on groundwater at least as a back-up supply, and 50 percent exclusively.

As the State grows economically and new industries locate, the reliance on groundwater will only increase. We want to protect it for all beneficial uses, industry as well as drinking water, agricultural use, and the maintenance of ecosystems.

I think the new reform in Oregon does have an appropriate balance between protection and cost, and the key to it is the protection of hot spots.

While there will be a lot of disagreement about that, it is a critical tool to ensure that clean-up occurs that is both appropriate and reasonable in cost, and that containment solutions are more appropriate than other lower cost options where hot spots are not concerned.

Even in hot spots which may be either ones in soil or groundwater where there is high concentration or high mobility and cannot easily be contained does not necessarily mean that all groundwater must be cleaned up to drinking water standards, but it does mean that the responsible party must consider treatment remedies if they are reasonable likely uses of the land or water where a non-treatment option would present an unacceptable risk.

Even in treatment, the remedy selection is subject to the balancing factors including reasonableness of cost.

We think that H.R. 2500's emphasis on cost benefit analysis and cost factors will go too far and not ensure that treatment is considered as a clean-up option, so the hot spot approach we offer as a tool to ensure that excessive contamination is not left in place while still putting appropriate bounds in the cost for remediation.

Another reform that Oregon adopted is a single risk level, 10 to the minus 6, that does not require treatment to that level, but does require protection of that level to ensure that the public will not be excessively exposed, and that can include institution as well as engineering and controls.

A couple of examples of how this affects us in terms of economic development. The alliance we currently have on groundwater protection is going to allow us to protect the future water supply of the City of Portland, which is currently threatened by a TCE release from a couple of sites.

It is imperative that we protect this resource to accommodate future industrial and population growth, and so in the protection of groundwater which I think would be done under the Oregon law, not so certain would be done under H.R. 2500, we can put those lands back into productive use and still make the necessary provisions for our future growth and protection of future health.

Finally, I would like to make a point about funding. We do believe that reauthorization is essential, that the Superfund should be continued.

don't agree with the proposed cap on Superfund sites because
believe there are sites that appropriately will come up in the
e that are Superfund caliber, and we would estimate that a
e of sites under the cap that is proposed in H.R. 2500 would
regon's fair share of that amount.
I think funding is an absolutely critical element of either li-
ity or reform or the cap process would limit our access to future
ding.
hank you.
The prepared statement of Langdon Marsh follows:]

PREPARED STATEMENT OF LANGDON MARSH, DIRECTOR, OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY

Good morning. I am Langdon Marsh, and I am the Director of the Oregon Depart-
of Environmental Quality. I am speaking today in support of Superfund re-
and elements of H.R. 2500, and I want to provide you with one state's perspec-
ive on a few critical issues.

INTRODUCTION

While Oregon may be unique in the particulars of its state Superfund, I believe there are many interests that are shared: our primary shared interest is to have both federal and state superfund programs that protect our citizens and our environment.

Oregon recently reformed its state superfund law. On July 18, 1995 governor Kitzhaber signed into law a reform measure that was sponsored by industry and was a collaborative effort among my agency, environmental groups, and the citizens of Oregon. Elements of the law are subject to additional rulemaking, but I believe that Oregon has a framework where we will get cleanup done at a lower cost while we protect our citizens and our natural resources.

Our legislature was quite receptive to superfund reform, but they were adamant that our natural resources would not be impaired. First and foremost was the protection of our citizens, but protection of groundwater was also imperative. Like most Western states, Oregonians rely heavily on groundwater: over 75% of Oregonians rely on groundwater as at least a backup water supply and almost 50% rely on groundwater exclusively. Our most sensitive aquifers are in our valleys, and these aquifers are most heavily used by our population and most subject to contamination. As Oregon grows and as new industries locate here, our reliance on clean groundwater is steadily increasing. While we are fortunate that the vast majority of our groundwater is not contaminated, we cannot afford to write off beneficial uses of water. Let me re-emphasize that we need to protect for *all beneficial uses—whether for drinking water, agricultural use, industrial use, or for the maintenance of viable ecosystems.*

I believe that Oregon's reformed superfund does have, or will have after rulemaking, the appropriate balance between protection and cost. My concern with H.R. 2500 is that it goes too far: too far in leaving contamination in place that affects neighboring property owners and future generations; too far in elevating cost as a balancing factor in remedy selection; too far in limiting protection for groundwater, and too far in shifting cleanup costs away from responsible parties. In each and every reform measure in H.R. 2500 there are ideas Oregon *could* support, but we cannot support measures that undermine the protection of groundwater and human health that the federal Superfund and the Oregon environmental cleanup programs need to deliver.

I will address certain titles in H.R. 2500 in some detail, but first let me offer a potential solution that was a prominent part of Oregon's superfund reform: "hot spots." While parties may disagree on how to define "hot spots," Oregon believes that this is a critical tool to ensure that cleanup happens where it is appropriate and cost-reasonable, and containment or other lower cost options are used when there are not "hot spot" threats. A "hot spot" is an area of high concentration or high mobility or one that cannot be contained and presents a risk to human health or the environment taking into account future land use and current and future beneficial uses of water. This does *not* mean that all groundwater must be cleaned up to drinking water standards, but it does mean that the responsible party (RP) must consider treatment remedies if there are reasonably likely future uses of the land or water where a non-treatment option would present an unacceptable risk. Even

though treatment is preferred at "hot spots," the remedy selection is still subject to balancing factors.

These factors are: (1) effectiveness of the remedy; (2) technical and practical implementability; (3) long-term reliability; (4) short-term risk from implementation; and (5) reasonableness of cost. So, while treatment is preferred for "hot spots," any remedy must be cost reasonable.

TITLE I—REMEDY SELECTION

We believe that H.R. 2500's "lowest cost" remedy selection language goes too far in that there are virtually no checks to ensure that treatment is considered as a cleanup option. Oregon believes the "hot spot" approach is a tool to ensure that excessive contamination is not left in place, while still putting appropriate bounds on the cost of remediation.

Oregon elected to move to a single risk level rather than retaining its site-by-site standard ("lowest feasible") or adopting the Superfund cleanup range (for simplicity, the cancer risk range of 1×10^{-6} to 1×10^{-4}). Oregon does not require treatment to the 10^{-6} level, but it does require protection to that level—the protection may include institutional or engineering controls that limit exposure. My concern with retaining the risk range while changing the whole of the risk calculus is that we will simply be juggling numbers and not protecting our citizens or our environment. If we change the risk protocol (how risk is calculated) and require the lowest cost remediation, we may be changing *cleanup* programs to *containment* programs that pose future and unacceptable risks to our citizens.

TITLE II—LIABILITY

Oregon supports the retention of the basic Superfund liability scheme. We also share the view that limited "carve-outs" (e.g., municipal landfills and de micromis parties) are appropriate, and that an allocation system can make liability more equitable. We do have concerns with the provisions for tax credits for cleanups of older releases. While parties with older releases may not have violated specific laws like RCRA, we believe that owners and operators should clean up the property they contaminated rather than forcing the public-at-large to bear those costs.

TITLE V—STATE ROLE

Oregon supports the proposed delegation of Superfund to the states. We believe the flexible structure allowing as much delegation as the state desires and can handle is the best structure. Likewise, we support self-certification and making the state share 10%. Our biggest concern is the override of state standards, and we are of course concerned about the potential of delegating authority without adequate funding. Oregon does not believe that state standards are in any way requiring "gold-plated" cleanups; we are requiring that cleanups protect our citizens and restore our resources for current and future use.

TITLE III—BROWNFIELDS AND VOLUNTARY CLEANUPS

Oregon supports the provisions to increase brownfields redevelopment. Oregon has a vigorous and proactive voluntary cleanup program and has employed prospective purchaser agreements to facilitate redevelopment. We believe that a clean environment and a strong economy are not mutually exclusive, but actually complement one another. Many of our new industries such as chip manufacturing rely on having pure water. We anticipate growth of more than 500,000 people in the Portland area by the year 2005. While Portland has a good current water supply in our Bull Run reservoir, Portland and the rest of the state rely on uncontaminated groundwater. Portland's main backup well supply in East Multnomah County (EMC) is currently threatened by a TCE release from two sites. We must protect this resource to accommodate future industrial and population growth. When we redevelop brownfields, we want to make sure that both the land and the water are put back into preductive use, where that's practicable.

TITLE VI—FEDERAL FACILITIES

Oregon shares H.R. 2500's goals of cleaning up and putting federal facilities back into preductive use as well. As stated before, we believe all RPs, including federal facilities, should be held to the same standards. State standards should prevail at these sites and the states should not be penalized for holding federal facilities to the same standards as other RPs. We support the provisions that provide a meaningful role in remedy selection to states that adjoin nuclear defense facilities. Like-

wise we support the waiver of sovereign immunity and requirement to follow state standards as well as the provision making compliance agreements enforceable by the states.

TITLE IV—NATURAL RESOURCES DAMAGES

Oregon believes that the reform bill must continue to allow restoraton costs for natural resources damages. We cannot support a monetary cap that would not allow full recovery, but we realize that the prospect of unlimited liability needs some bounds. We believe that limiting the time in which a claim can be filed by a trustee and requiring more thorough assessments are reasonable steps, but limiting recovery to "committed uses" may be too narrow. Under Oregon's environmental cleanup law, we anticipate that contaminated groundwater will be cleaned up, when warranted, through remedial action at the site. However, if responsible parties do not do an adequate job of cleaning up or containing contaminated groundwater, we may see an increase of natural resource damage claims by states. Oregon has had very few cases of natural resource damage claims, and we would like to avoid such "back-door" claims by having the RP clean up groundwater "hot spots."

TITLE X—FUNDING

Finally, I would like to say a few words about funding and the long-term future of Superfund. We believe that reauthorization is essential and that Superfund should be continued. We do not agree with the proposed cap on Superfund sites. While Oregon has only a dozen Superfund sites, we have over 200 state superfund sites. Few of these sites are of Superfund caliber, but we believe that there are more such sites than the 2 that might be Oregon's fair share of the cap amount. While we support and would seek delegation of Superfund to the state, we are concerned that the level of funding and support that come with delegation be adequate.

CONCLUSION

We believe that Oregon is on the right path to balance protection with reasonable cost, but we have grave concerns that provisions of H.R. 2500 will undermine the ability of the states to carry out effective environmental cleanup programs. Oregon believes it, and other states, must have the ability to set and enforce cleanup standards; require treatment of "hot spots"; enforce cleanups of all RPs in an equitable manner; and provide oversight and assistance to those who wish to redevelop brownfields. H.R. 2500 takes some good steps toward reforming Superfund, but some of the provisions go too far by weakening the level of protection for our citizens and environment. I urge you to look carefully at many of the reforms and weigh how these changes will affect the environment by weakening state programs. I ask that you recognize the continued need for Superfund and that you reform the law in ways that make it less onerous without removing the power to protect groundwater and other resources. We hope to continue to work with you to achieve the shared goals of the states and federal government, while environmental protection and economic development work hand-in-hand.

Thank you for the opportunity to testify today. I would be more than willing to answer any questions you may have.

Mr. CRAPO. Thank you, Mr. Marsh.

Finally, Ms. Dunham.

STATEMENT OF FRANCES DUNHAM

Ms. DUNHAM. Mr. Chairman and distinguished members of the subcommittee, the other members of Citizens Against Toxic Exposure and also the Communities at Risk Network in 33 States join me in thanking you for the opportunity to present testimony on the reform of the Superfund Act of 1995 or ROSA.

I am going to speak about 2 sites in Pensacola that illustrate some problems with Superfund that we've had, and suggest that this bill would move us in the wrong direction in terms of solving those problems. In fact, it might create more.

A monument to the failure of environmental law enforcement, Escambia Treating Company sits at the center of a historically

mixed industrial/residential area in the middle of Pensacola 98 feet above sea level and just 48 feet of sandy soil above the aquifer which supplies drinking water to the greater Pensacola area.

Toxic wood-treating chemicals saturate the sandy soil all the way to the groundwater with dioxin levels in surface soils as high as 1.09 parts per million and separated from residential yards by nothing but a broken chain-link fence.

The site was an ongoing threat to public health and environment, unattended and uncontained for 9 years after it stopped operating.

Incidentally, the owner/operator was a former Pensacola mayor.

In October 1991, EPA began emergency removal of contaminated soil, releasing toxic dust and fumes into the residential neighborhoods. Four years later, Mount Dioxin, 260,000 cubic yards of plastic covered poison soil, is one of the most prominent geographical features of Northwest Florida. At least another 50,000 cubic yards remains on-site and there is off-site contamination.

No matter what clean-up treatment is to be used, it will involve uncovering and moving it around again, further exposing the closest neighborhoods.

Right across the railroad tracks there is Agrico Chemical Superfund where the wood-treating chemicals have been found in addition to Agrico's own contaminants.

If the emergency removal at the wood-treating site had been confined to the relatively routine clean-up of leaking drums, lab, a transformer and a boiler, the nearby residents would have welcomed it.

Instead, EPA bulldozed the asbestos boiler building and then began the excavation of the very contaminated soil and sludge without determining the magnitude of the problem.

Proud of his absolute authority at the site, one of the removal actions coordinators referred to himself as a "cowboy." When former workers offered to point out areas of extreme contamination, he told them to get lost.

According to EPA—and, incidentally, according also to ASTDR—that soil was having an emergency, the people were not.

It could be hard to tell that public health protection was the original reason for these clean-up laws. The excavation created a straight 40-foot drop from the yards bordering the site. Several properties had to be shored up to keep them from falling in the huge pits. The foundation of one home was cracked.

For over a year workers in moonsuits dredged up toxic soil less than 15 feet from children playing in their own yards, although EPA workers did remove their protective gear for 1 day in October 1992 when a rally for local officials and the press was conducted on-site.

We feel that it was reckless and we would advise against extending what was supposed to be an emergency removal program to be used for regular Superfund sites.

EPA's soil removal caused chocking fumes and poisonous dust with respiratory distress, persistent skin rashes, burning eye irritation. But even worse, it may have caused damage, permanent damage that might not show up for years. Years had accumulated with treating waste. Pentachlorophenol, dioxins, furans, creosote, ar-

arsenic, benzopyrene, naphthalene, toluene, cooper, chromium and more, including dieldrin, were being dug up and blowing in the wind.

EPA was making sick people sicker, but site coordinators insisted that this was a noted problem.

The residents were desperate to stop the digging, but EPA claimed that it was determined to save Pensacola's drinking water. There was almost no way to stop it.

Meanwhile, at the other site, the PRP's were given approval not to clean up the contaminated drinking water. We couldn't follow—we still can't follow the logic of those decisions.

I see the time is up. I want to thank you for an invitation to speak here today.

[The prepared statement of Frances Dunham follows. Articles entitled "In Praise of Superfund," and "Communities at Risk" are retained in the Committee files.]

PREPARED STATEMENT OF FRANCES DUNHAM, CITIZENS AGAINST TOXIC EXPOSURE

Mr. Chairman and distinguished members of the Subcommittee, the other members of Citizens Against Toxic Exposure (CATE) and Communities at Risk join me in thanking you for the opportunity to present testimony on the Reform of Superfund Act of 1995 (ROSA).

CATE was formed in the spring of 1992 because of urgent concerns about the health of residents near Escambia Treating Company (ETC) in north central Pensacola, Florida, where EPA was conducting an "emergency removal" of contaminated soil. Eventually that soil became "Mt. Dioxin," 260,000 cubic yards saturated with woodtreating wastes which also include arsenic, pentachlorophenol, creosote, and other toxic substances; the site was added to the National Priorities List in December 1994. Just across the railroad tracks to the southeast is the Agrico Chemical Superfund, where soil and groundwater testing has found ETC contaminants in addition to Agrico's own toxic contaminants (which include lead and benzo(a)pyrene) and a very dangerous pesticide (dieldrin) of unknown origin. Between and around the two sites are three entirely African American residential neighborhoods and a public housing facility. Situated just 48 feet of sandy soil above the aquifer which supplies Pensacola's drinking water, this historically mixed industrial/residential zone at the center of Pensacola has important environmental and economic consequences for the greater area.

CATE would like to be able to support passage in 1995 of Superfund legislation which maintains as foremost the original purpose of CERCLA, the protection of human health and the environment. This testimony will focus on elements of Superfund reauthorization which greatly concern CATE as a typical affected community, the category of stakeholder which has the most at stake.

The Communities at Risk: Platform for Superfund Reauthorization, to which CATE is a party, is appended.

REMEDY SELECTION

Risk Assessment

In Section 127(a)(1) there is a directive to "provide scientifically objective and unbiased estimates and characterizations which neither minimize nor exaggerate the nature and magnitude of risk to human health and the environment...." In fact, such precision, balance, and objectivity are currently impossible, as is acknowledged in Section 103 which calls for identification and explanation of "all significant assumptions...(and) the policy or value judgments used in choosing assumptions" in facility-specific risk evaluations.

Critics have rightly objected to many underlying assumptions typical of human health risk assessments: The person exposed to this (single) chemical is a healthy (and previously unexposed) adult male. Using the data from high-dose, short-duration animal testing to predict human health effects from chronic low-level exposure also entails much uncertainty. Another misleading aspect of assessed risk is that synergistic interactions of toxics, frequently the most damaging effects, are never considered.

Exposure estimates don't usually account for children's greater contact with soils and their higher respiration rates, and seldom is any effort made to include exposures from backyard gardens. In making assumptions about exposure to water pollution, the estimates concerning fish consumption are so low that many people (especially subsistence fishers like Native Americans and other minorities) are discounted and deliberately endangered in the quest for more permissive standards. Risk assessments are notorious for their failure to include exposures of farmworkers to pesticides and other workers to industrial chemicals. The steep tilt against the poor and against minorities is a dominant theme in risk assessment for cost/benefit analysis. It is as if their protection (the benefit) were some sort of undeserved gift, while cleanup expense (the cost) were an unfair burden to the industrious and productive segments of society.

In ROSA, risk is expressed only as a number of excess cancers, even though birth defects, genetic damage, and immune system damage are triggered by many toxics (like dioxins and other endocrine disruptors) at doses much smaller than those which cause cancer. Exposure sufficient to cause one excess cancer in ten thousand to one in one million persons is considered acceptable, even though the actual risk can be much greater.

ROSA expressly limits protection to the "90th percentile of exposure probability distribution," in effect designating the ill, the old, the previously exposed, and the nation's children as sacrifice populations. It is not clear what factors would determine the choice of a risk number (within the range of one excess cancer in ten thousand to one in one million persons) at any specific site or what actual risk number would result from setting protection at the 90th percentile.

Any cleanup must remove threats to human health without creating new ones. The use of the term "increased net risk" suggests that a community might be expected to undergo further exposure during cleanup. Remedies which could cause or allow for further exposures must trigger relocation. Employees of affected industries and others with a conflict of interest must be prohibited from serving on the independent external peer review panels described in ROSA.

Cost benefit analysis based on risk assessment is a quasi-scientific process easily manipulated to rationalize protecting industry profit at the expense of human health and the environment. It's horse trading, with humans. Former EPA Administrator William Ruckelshaus characterized the process: "Risk assessment data can be like the tortured spy. If you torture it long enough it will tell you anything you want to know."

Involved with Superfund from its inception in 1980, engineer Joel S. Hirschhorn, charged as early as 1985 that Superfund technology choices were weighted too heavily for short-term savings to the polluters. Asked to describe risk assessment, he replied, "It's lying, with numbers." An Office of Technology report Hirschhorn co-authored explains:

> Risk assessment always has been and will remain intimately mixed up with ethical and economic issues. Going beyond concepts to formal, quantitative analysis offers the appearance of scientific certainty that exists in the physical science and engineering. But this is generally a facade that quickly crumbles under objective scrutiny, usually because the data are so poor. Moreover, the application of risk concepts means making many assumptions and using many simplifications that implicitly introduce personal or institutional values into the process. The fact is that formal, quantitative risk assessment is not a science, nor does it offer, today, a reliable sole or primary basis on which public or private institutions should make important decisions affecting the general public.

An example of risk assessment accounting can be seen in EPA's attempts to establish a dollar value for reducing lead poisoning in children: an infant's life was calculated at between $2 and $10 million; each IQ point was worth $4,588 in lifetime earnings. Human intelligence was not calculated to have any other value besides earning power. Lead risk is interesting also for the wide fluctuations in levels thought to be "safe:" in 1960, 60 micrograms per one-tenth of a liter of blood; in 1975, 30 micrograms; in 1985, 25 micrograms; and in 1991, 10 micrograms. According to the Environmental Research Foundation, the high levels were due to industry machinations:

> When studies reveal that a particular chemical probably causes birth defects, the producers and users of the chemical typically conduct a lengthy campaign to deny and obscure what is known. For example, the lead industry has known for at least 100 years that lead causes reproductive and developmental disorders in humans. But starting in 1925 medical doctors hired by the lead industry argued that lead occurs naturally in the human

body and, therefore, the dangers of lead in gasoline were not worth worrying about, much less studying. This strategy was persuasive to the public health community for 40 years.

Acceptance of risk from exposure to industrial contaminants contrasts sharply with our careful consideration of the side-effects and contraindications associated with pharmaceutical drugs. Medicines which might be beneficial to the ill are expected to be proven safe as well as effective before wide (voluntary) administration; yet toxic byproducts are routinely administered to Americans without their knowledge or consent.

We cling to the illusion that toxic chemicals are neatly contained in someone else's neighborhood or workplace. Meanwhile, industrial toxics are everywhere, at ever increasing levels, ascending the food chain, accumulating in human tissue. And some 500 new and largely untested synthetic chemicals are added each year to the more than 65,000 already in commercial use. Environmental attorney Allan Kanner notes that when testing does get underway it can take years to produce results, notably when, "...alleged scientific 'controversies' turn out to be contrived. Courts, legislative oversight committees, and investigative journalists have in recent years uncovered a frighteningly long list of deliberate industry efforts to suppress critical scientific data."

As Barry Commoner put it, "Like the sorcerer's apprentice, we are acting upon dangerously incomplete knowledge. We are, in effect, conducting a huge experiment on ourselves."

Cleanup Standards

The use of interim containment and remediation is unavoidable where permanent treatment technology is unavailable; it is not justified by cost savings to industries who reaped windfall profits by improper disposal and dumping of toxic chemicals. At best, containment postpones the problem; at worst, it exacerbates the problem by covering it up while contamination spreads. ROSA would reverse the law's preference for permanent treatment, leaving many communities like ours to live with constant threats if not constant dangers. It is not enough to provide bottled water if the public is left with the potential for exposure to contaminants through other pathways. Reliance on point of use treatment for contaminated water supplies or alternative sources of drinking water leaves a very costly legacy for the future, especially when final covenants not to sue are to be granted before performance and PRP's are invited to claim "technical impracticability" before a remedy is attempted. CATE believes, as do the residents of other affected communities, that the goal should be a return to pre-contamination conditions as quickly and as completely as possible; this corresponds with the public's commonsense expectation of cleanup and with the legal principle of making whole.

Land Use

Land use designation must not be used to justify the creation of sacrifice zones on the assumption that industry will recontaminate them anyway. Rapid revitalization and redevelopment of these areas would provide jobs and prevent urban sprawl, according to this rationale. This argument ignores the many residential neighborhoods in or adjacent to industrial zones, it ignores the health and safety of workers, it ignores the risk to groundwater, and it ignores the very real progress achieved and achievable in toxics use reduction (pollution prevention). Here in Pensacola, as in other old industrial areas, premature redevelopment would bring the dirtiest industries to the center of the city, allowing for continuing endangerment of workers, the minority and low-income communities often located near industrial areas, and, of course, groundwater. In Florida, where 92% of drinking water comes from groundwater, this is an extremely precious resource, and its contamination can endanger almost everyone.

Basing remedy selections on projections about the future use of land and water invite constant erosion of standards and resulting threats to human health and the environment. The result would very likely diminish flexibility in future uses of land and water, no matter what changing conditions might indicate their use. Dangerous and short-sighted, this would inevitably result in the widespread destruction of natural systems and resources, in the arrogant assumption that we can predict future needs and that everything is ours to squander.

Community Participation and Human Health

It is essential that Community Assistance Groups (CAG's) be formed early in the evaluation process, that they be eligible for Technical Assistance Grants, and that they have an enforceable right to participate in all decisionmaking about land use, health protection, and remedy selection. The CAG's must be comprised of residents

in the zone of highest potential exposure. Without this safeguard, groups might easily be dominated by other interests, making land use decisions and approving remedy choices to the detriment of the those living on or next to a site. Unless these closest residents are to be relocated at government expense, their majority representation is an ethical imperative. If the closest residents are relocated, the next closest would take their place. ROSA Section 121 states that acceptability of the remedy to the affected community will be based on its acceptability to the elected officials of the local government; in many communities this would only perpetuate environmental abuse.

Unfortunately the Agency for Toxic Substances and Disease Registry (ATSDR) has seen its primary role as the provider of epidemiological studies and health assessments criticized as largely useless by the Environmental Health Network, Citizens Clearinghouse for Hazardous Waste, the Environmental Research Foundation, the General Accounting Office, the National Academy of Sciences, and other medical professionals. It has been very difficult for ATSDR to understand that to Superfund communities "medical assistance" and "health services" do not mean endless rounds of inconclusive studies, a few workshops with local doctors, or poster contests. Communities urgently need and want health protection and treatment for very real physical damage caused by exposure to toxic substances; a far better use of ATSDR's budget would be for community-based and directed health clinics. These clinics could diagnose and treat patients suffering from the effects of exposure to toxic substances, saving lives, health, and money by minimizing and preventing health effects. The clinics could also collect critically needed data and train physicians on environmental health problems.

States' Roles

Many Superfund sites are the result of the states' failure to enforce RCRA and other delegated environmental laws; any delegation of Superfund responsibilities must be accompanied by very strict federal oversight. ROSA allows for states to administer the program and to delist sites (with the agreement of the PRP's; the closest residents need not be consulted), but they are powerless to set cleanup or disposal standards to protect their own citizens. Since contamination respects no boundaries in air, soil, or water, each state is at risk from those which surround it. For those states which wish to impose higher cleanup standards, it is important that the law provide for recovery of the cleanup cost difference from the PRP or from the Fund. Not to allow such cost recovery would be an unfair restriction of states' authority.

National Priorities List (NPL)

This could be the difference between facing up to one of our most critical issues and running away from it. Premature capping and sunsetting the NPL and expedited delisting before complete and permanent remediation would be an exercise in denial of a real, urgent, and growing problem. Certainly we all hoped that the original Superfund would be a temporary program and a quick solution for a small number of hazardous sites. That these cleanups have been costly, difficult, and time-consuming is an argument for toxics use reduction, not for the pretense that the "stigma," rather than the contamination, is at fault.

"Emergency removals," here called "removal actions," should be strictly limited to emergencies such as fires, floods, and explosions. They do not provide for the kind of careful consideration and community participation which cleanup of non-sudden contamination requires. As noted above, CATE has experienced a removal action at the ETC site. It took three years, cost $7 million, and did considerably more harm than good.

Liability

The charge that Superfund has wasted time and money is true, but for very different reasons than are frequently given.[1] During the early eighties Superfund was blatantly abused under a hostile administration. Contractor spending scandals were legendary, a pattern now somewhat restrained, although the profit of the hazardous waste industry is still an important factor in too many cleanup decisions. The lawsuit paralysis so often cited as proof that Superfund is "broken" is overwhelmingly the legal departments of polluting industries and their insurance companies duking it out over who is going to get stuck with the bill. Fortunes have been made by corporate attorneys who became experts at thwarting EPA cost recovery. Sometimes

[1] See Charles de Saillan's discussion of CERCLA liability, "In Praise of Superfund," ENVIRONMENT, October, 1993, and de Saillan's response to a letter from Thomas O'Brien in the April 1994 issue. (both are attached)

suits have been filed by major polluters against minimal contributors at a site (such as mom and pop businesses which used a landfill that also took hazardous waste) just to create popular outrage against Superfund and EPA.

Instead of toughening up the law to make Superfund liability more difficult to evade, many are now advancing proposals to eliminate strict joint and several site-specific retroactive liability. If enacted, this change would undercut an important function of Superfund and ultimately enable, excuse, and encourage the creation of additional seriously contaminated sites.

The thinking is that, if the release of toxic materials at a site was not illegal at the time, its cleanup should not be billed to those who released it. But if polluters are to be excused, who could be expected to pay?

• Charging other industries is blatantly unfair; it punishes those who have reduced toxics use or have properly disposed of wastes. It means that cleanup costs would be reflected in prices of products produced in the least damaging ways as well as in the most damaging ways, instead of letting those costs provide a market advantage as an incentive to cleaner processes.

• Charging general revenues is even worse: a toxics subsidy, a virtual guarantee of continuing large-scale contamination and an incalculable (but immense: hundreds of billions of dollars) drain on the budget. Of course, this would also be a cruel joke on taxpayers, based on the principle that, by funding the regulatory agencies who plea-bargained away the enforcement of environmental laws, they are now considered willing accomplices in contamination and rightfully responsible for cleanup costs.

Liability for cleanup is one of the few effective deterrents to environmental irresponsibility; "forgiving" the "responsible parties" by underwriting cleanup rewards that irresponsibility. Especially when combined with looser cleanup standards, it would invite continuing destruction. It would hint at even greater permissiveness in future legislation. Because some polluters are now also cleanup contractors, there would be a real potential that responsible parties, excused from the legal obligation to cleanup up at their own expense, would be paid by other businesses or by taxpayers to clean up their own sites. It is interesting to note that, while decisions against reducing toxics use and against proper disposal were driven by profit motives, the obligation to clean up is characterized by some industry spokespersons as "punishment." Cleaning up one's own contamination is simple accountability.

Limits on lender liability, combined with the lowering of cleanup standards for industrial zones, could result in coverups where there should have been cleanups, a clear invitation to the very companies most likely to endanger minority communities, workers, and groundwater. Maintenance of CERCLA provisions in for recovery of punitive damages is essential in order to make stalling and noncompliance unprofitable.

The direction of any changes to Superfund law is vitally important, both for cleanup policy itself and as an indicator of our society's seriousness about the protection of its citizens from exposure to toxic substances. Thank you for this opportunity to present CATE's concerns for the record.

Mr. CRAPO. Thank you, Ms. Dunham. I will take the first round of questions.

I will welcome comments by any member of the panel on this. I am going to direct this question to Ms. Florini because the concern that you raised about cost-benefit analysis is a concern to me.

As I read the bill, though, I seem to read it differently than you do, and I want to be sure that we are both understanding what the bill does.

As I understand your testimony, you have no objection to cost-benefit analysis, but you believe it shouldn't be a determining factor. In other words, that it shouldn't be the sole factor by which the evaluation of a remedy is gauged; is that correct?

Ms. FLORINI. Yes.

Mr. CRAPO. And as I read the bill, I don't see that the cost-benefit analysis is made the sole factor, and I just want to refer quickly to a couple of sections in the bill.

First of all, on page 11, lines 12 and 13, it states: "No preference or bias shall apply to any specific method of remediations," indicat-

ing that there is no specific direction in this statute that any particular type of remediation must be used over any other.

Over on page 14 and 15 where it talks about the factors the President must use in selecting a remedy, it goes from A through E on different factors the President must evaluate with cost being only one of them listed at the end.

Ms. FLORINI. Quite right, but—I'm sorry.

Mr. CRAPO. Let me just quickly finish. The next section indicates that the President does have to certify that the cost-benefit analysis has been done, and it does state that the President should give a preference to the most cost-effective remedial option.

But the rest of that sentence says the most cost-effective remedial option that adequately protects human health and the environment for realistic and significant risks.

So it seems to me the goal of protection is not being given up; it is being said, as I read the statute, that the most cost-effective way to solve and address the environmental concerns should be selected.

Ms. FLORINI. Mr. Chairman, the fundamental problem is, in fact, in 121(f)(2), because it actually requires that the certification be done and that the incremental cost be justified by the incremental risk reduction benefits.

It also goes on to provide that you must quantify those benefits and costs to the maximum extent practicable and employ present net value basis evaluations to the extent feasible.

If you add those things together, along with what I believe are the very problematic features of the way that health is to be evaluated in the risk assessment provisions in terms of the use of the most plausible assumptions in conjunction with the central estimates which I believe will undercut the ability to protect sensitive subpopulations and the extremely narrow—I would actually have to go so far as to say absurdly narrow definition of the only environmental risks that count under the bill's specific provisions on what it means to protect the environment, and I think what you come up with is a decision to use the most cost-effective remedy to get to quasi-protection of health and quasi-protection of the environment.

Mr. CRAPO. So you are saying you do not believe the President does not have the flexibility under the language in this statute to do what is necessary to adequately protect the environment, and that he must simply go to the cheapest solution?

Ms. FLORINI. No, that is not what I said. I said the President, under this bill, would be protecting health as defined in this bill which is, in turn, assessed using a risk assessment methodology which is not protective of sensitive sub-populations because of the requirement to use plausible assumptions in conjunction with central estimates.

And, in particular, even more glaringly problematic is the narrow definition of what it means to protect the environment.

You ignore resources unless you can make an affirmative finding that they are necessary to a significant ecosystem.

Mr. CRAPO. But doesn't the act provide that the President has the authority to specify the population that is the subject of the estimate?

Ms. FLORINI. Yes, I've had this discussion with your staff before.

That might be able to be used by the Environmental Protection Agency or the Justice Department in litigation over what the phraseology that we've both been referring to might mean.

I do not know how that litigation would ultimately come out, and I don't think your staff is going to be able to definitely resolve that either.

Mr. CRAPO. It seems to me that the statute is very clear. It says the President shall specify the population, and if your concern is that he wouldn't specify a subpopulation, I mean, the statute says that he can specify that.

Ms. FLORINI. I think that equally plausible—at least a colorable reading of those words—could also be that the population in question is the population as a whole affected by the site.

Mr. CRAPO. Okay. I see my time is up.

Mr. Engel, did you want to respond?

Mr. ENGEL. Mr. Chairman, just to make a suggestion, because it seems to me listening today that a number of people on both sides of the aisle said that they do not believe that cost-effectiveness is the only criteria that needs to be used.

I guess as a litigator I feel that somehow we can clear this up in the bill, that simple statements such as that might be able to satisfy everyone and then we could move on.

Mr. CRAPO. I would say I would be very glad to do that. It seems to me when you list 5 or 6 different options and say none prevails over the other, that does say it, but if there is another way——

Ms. FLORINI. Except that you then independently and separate from that subsection that has the 5 criteria, you have a separate subsection that independently requires the demonstration and certification.

Mr. CRAPO. Not wanting to impede on my co-partner's time here, I will just respond by saying the requirement of a cost-benefit justification does not make the cost-benefit justification a dominant factor in the evaluation. It simply requires that one must be done.

Mr. Wyden.

Mr. WYDEN. Thank you, Mr. Chairman. I just want to note, Mr. Chairman, for the record, that the Democratic members of the subcommittee weren't here for the prior panel's testimony because of the consideration of budget reconciliation over the past hour. That was the Commerce Committee's time allocated to debate, and I just want our witnesses to know that this is not in any way reflecting our interests in this very important issue because our folks have been here throughout the day.

We also want to welcome Mr. Marsh who has traveled from Oregon for this hearing. Mr. Marsh, we know of your good work.

I have a couple of questions primarily relating to the effort that came out of the legislature this last session, and how it would relate to the bill we would be dealing with now.

Now, the clean-up revisions that came out of Oregon recently were essentially industry driven. They were proposals that industry sought.

My question to you is, are there protections in that law for neighboring property owners, taxpayers, and businesses that you would

like to see this subcommittee consider as we go forward with, hopefully, bipartisan work on Superfund?

Mr. MARSH. Yes, I think so. While the reforms adopted by the Oregon legislature do, I think, make the clean-ups cheaper and simpler from the point of view of the responsible parties and lower the transaction costs, I think they also provide adequate protection for neighboring property owners and the public and the environment because they do require that more consideration be given to the clean-up of hot spots that have the likelihood of migration offsite, number one.

Number two, by having a risk level defined in the statute that must either be cleaned up to or other types of protections, particularly in the case of non-hot spots put in place which might be engineering or institutional controls, I think they will assure the protection to an adequate health level of neighbors.

Mr. WYDEN. So those would be two features that come out of the Oregon bill that you would like to see in the Federal bill?

Mr. MARSH. Yes.

Mr. WYDEN. I would like to note for the record that they're not in there now.

What effect will this reform bill have on Oregon's ability to address those Oregon sites that aren't on the NPL?

Mr. MARSH. Well, I think the effect may be indirect. By having a cap on the number of future Superfund sites that can be named, and by the potential which has been hotly debated here today, the potential for using up much of the Superfund money available to the States for clean-up of NPL sites through other exemptions or through rebates, what have you, there is a potential that some sites that might have been eligible for funding under Superfund will not get funded.

Mr. WYDEN. Do you think this reform bill is going to do an adequate job of protecting Oregon's groundwater?

Mr. MARSH. I think this goes to the discussion that Ms. Florini was having a few minutes ago.

As we read the provisions, there is less likelihood than under present State or Federal laws where groundwater is to be protected and because of the preference for cost-effective solutions, et cetera, therefore remedies that are more or less normally and usually required today may not be under this bill.

Mr. WYDEN. Under the ROSA approach, would the site that we have in East County, the East County groundwater site, would it be dealt with adequately under the ROSA legislation?

Mr. MARSH. I think it is the same answer. I think there is less likelihood that a groundwater protective remedy would be selected under the terms of the ROSA bill.

Mr. WYDEN. But under the current law it has got to be cleaned up, but under the ROSA bill it is not clear?

Mr. MARSH. While there is a preference in current Superfund and—although this is not yet a Superfund site, I would point out, but there is a preference under current Superfund for clean-ups, and under the new Oregon law this would qualify as a hot spot that would need adequate protection.

Mr. WYDEN. Ms. Florini, what is your assessment of the public participation provisions in ROSA as compared to current law and last year's legislation?

Ms. FLORINI. Mr. Wyden, I think they're very, very troubling. In most ways they are substantially weaker than current law.

In last year's bill, one provision that I would like to say that we do appreciate is the elimination of the matching grant requirement for technical assistance grants.

One of the biggest problems I would like to point out with respect to public participation is, for example, that there is no public participation in the State delegation process.

Not only is there no role for citizens to make known their views in the delegation process, but prior experiences of citizens in the State have no bearing whatsoever on whether the State receives delegation or not, so even if the citizens have experienced serious problems and the agency does somehow come to know these, there is no way for EPA to withhold delegation on that basis.

What's more, EPA is expressly precluded from placing any conditions or terms on a delegation.

The sole basis for rejecting a delegation in a program that already has corrective action authority is the lack of adequate legal authority.

Similarly, the State can remove a site from the NPL on the basis that there is an enforceable agreement to clean up the facility instead. There is no indication of what enforceable means, how that agreement was achieved, whether there was any public participation in whatever the substitute agreement might be.

Indeed, there is apparently no indication that the public gets any prior notification or opportunity to comment.

Mr. WYDEN. My time is up. I only ask it in this kind of sequence because I sort of see between Mr. Marsh who has done such yeoman work in Oregon and your comments, Ms. Florini, the ability to take some of these suggestions and get to a bipartisan bill.

You both, for example, talk about the importance, Ms. Florini, of the State protective clean-up standards. Mr. Marsh has talked about the need not to have State laws preempted.

You have appropriately, in my view, stressed the need for adequate public participation, and the irony is Oregon has essentially done these kinds of things that the two of you have suggested in an industry-driven kind of approach that was signed by a Democratic Governor.

I thank you both for excellent testimony and first-rate suggestions, and I would like, before we're done, to see if I can lure my colleagues out to the Pacific Northwest to see how we do this job right.

I thank you for the time, Mr. Chairman.

Mr. OXLEY. The gentleman's time has expired. The Chair would just have one question for Mr. Marsh based on his statement.

Looking at the legislation, let me quote from it: "Appropriate remedy shall be based on the current and reasonably anticipated future uses of land, water and other resources," so that under our bill that is the first test. Before we get to anything else, that test is paramount. That is, what is that future use going to be for the water.

It is not until that is determined, that future use, that we get into the next proposal.

I would ask you to take another look at that. I think our goals are the same here, as the gentleman from Oregon pointed out. Frankly, I don't think we're that far apart in what we're trying to do.

Mr. MARSH. I would hope not, Mr. Chairman. My concern was about the new language—as I guess it did in the colloquy while you were absent—to a potential concern that these factors would have to come out in favor of a less effective remedy, particularly for hot spots that might have the potential for migration off-site. It is really that concern that led me to raise the issue.

Ms. FLORINI. Mr. Chairman, if I might. I am very glad to hear that is, in fact, your intent. It is certainly one with which I agree, but I do think you need to clarify that language because as it stands right now, I think we might well find ourselves—more specifically, EPA and the Justice Department might well find themselves involved in litigation over whether it is the land use after the remedy or the land use that—sort of a question of the cart before the horse.

You said you want to pick the land use and the water use first and design the remedy around that. The fact that you've got no preference for any particular method of clean-up and that you have a specific provision allowing for use of easements that restrict land and water use, I'm afraid could be taken to indicate that one of the ways to determine what the land use is is to restrict it first.

If that is not your intent, I applaud that and then I just urge you to clarify that in the bill.

Mr. OXLEY. Thank you for your comments. Clearly, the future use, I think, is very important here. That we take a realistic look at what is indeed the future use, either the land or the water, and proceed accordingly.

Thank you all for your patience in sitting around most of the day, and we've appreciated your testimony and found it most enlightening.

Thank you.

We would like to welcome our sixth and final panel. It is not true that your clothes went out of style while waiting to testify but it is close. So I would like to introduce our distinguished witnesses. The first witness is the honorable Douglas Hall, Assistant Secretary for National Oceanographic and Atmospheric Administration; the second panelist is Mr. Martin McHugh, New Jersey Department of Environmental Protection; Mr. Charles deSaillan, Assistant Attorney General for Natural Resources representing the National Association of Attorneys General from the State of New Mexico; and Ms. Carol Foster from the Chesapeake Corporation from Richmond, Virginia.

To all of you, welcome to the panel and we will begin with Mr. Hall.

STATEMENTS OF DOUGLAS K. HALL, ASSISTANT SECRETARY FOR OCEANS AND ATMOSPHERE, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, DEPARTMENT OF COMMERCE; MARTIN J. McHUGH, NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, ON BEHALF OF ASSOCIATION OF STATE AND TERRITORIAL SOLID WASTE MANAGEMENT OFFICIALS; CHARLES deSAILLAN, ASSISTANT ATTORNEY GENERAL, NEW MEXICO, ON BEHALF OF NATIONAL ASSOCIATION OF ATTORNEYS GENERAL; KEVIN McKNIGHT, ALUMINUM COMPANY OF AMERICA, ON BEHALF OF COALITION FOR NRD REFORM; AND CAROL R. FOSTER, MANAGER, GOVERNMENT RELATIONS, CHESAPEAKE CORP.

Mr. HALL. Thank you, Mr. Chairman, members of the committee. I appreciate the opportunity to testify here today. I am Doug Hall, Assistant Secretary in the Department of Commerce and Deputy Administrator for the National Oceanic and Atmospheric Administration. With me today is Craig O'Connor, NOAA's Special Counsel for Natural Resources.

I am here on behalf of the Departments of Interior and Agriculture, as well as NOAA, to discuss the natural resource damage assessment provisions of H.R. 2500, The Reform of the Superfund Act of 1995. NOAA, Interior and Agriculture, along with the States and Indian tribes, are trustees for our Nation's natural resources under these provisions.

At this time, I ask that my written testimony be submitted for the record.

Mr. OXLEY. Without objection, all of the written testimony will be made a part of the record.

Mr. HALL. I commend the committee and you, Mr. Chairman, for your efforts to address the concerns that have arisen over the years with the implementation of the Superfund Act. Some of those concerns are valid but a number of the concerns with regard to the natural resource damage provisions are not. The natural resource restoration programs of our departments and those of the States and tribes have been very effective in addressing the needs of our Nation for the restoration of natural resources harmed by the discharge of oil or hazardous materials.

As I have testified in the past, to weaken the natural resource damage provisions of Superfund or the Oil Pollution Act, is to abandon the people of the Unitod States and our shared responsibility to them to protect, conserve and restore our natural resources. H.R. 2500 is that abandonment.

Let me describe the impact of certain provisions to illustrate my point. First, H.R. 2500 eliminates Federal trusteeship over resources for which the Federal Government has management responsibility. This limitation will deny comprehensive protection and restoration of migratory birds, marine mammals, numerous endangered species and the vast majority of marine fishery species.

For instance, in Idaho, the spawning habitat for salmon has been severely degraded as a result of toxic mining waste being dumped into spawning streams. The citizens of Washington and Oregon depend on those salmon for recreational and commercial fishing, for subsistence, for Native American cultural ceremonies. Washington and Oregon have no authority to compel the restoration of those

contaminated streams in Idaho. NOAA and the Department of the Interior do, if they are allowed to exercise trusteeship based on their management authority over salmon. Such would likewise be the case with contamination of coastal fisheries or migratory waterfowl. The scope of Federal trusteeship must include those resources over which the Federal Government has management authority.

Second, H.R. 2500 redefines the "double recovery" provision of Superfund to include any recovery, under any law, if there is a connection with any natural resource injury or loss regardless of whether that recovery was by a natural resource trustee or is to be used to restore natural resources. If a single fisherman were to settle a claim for lost fishing profits, the public would be denied its right to seek restoration of the degraded fishery resources.

This provision has a direct impact on pending litigation, the Bunker Hill case in Coeur d'Alene Basin in northern Idaho. Because the State of Idaho settled its natural resource claim in the early 1980's for less than 1 percent of the money needed to restore the massively contaminated basin, the Federal trustees and the Coeur d'Alene Tribe would be denied the right to pursue the remaining restoration claims. Fifteen hundred square miles of spectacular wilderness that has been contaminated with arsenic, lead, zinc and cadmium would be left unrestored. The tundra swans would continue to die and the once plentiful cutthroat trout would not return for generations if at all. This provision must be eliminated.

Third, H.R. 2500 unreasonably caps natural resource damage liability at an aggregate limit of $50 million for all parties, all facilities and all cumulative releases at sites listed on the National Priorities List for the entire contiguous area of those sites not on the list. The effects of this provision will mean that the natural resources affected by the DDT contamination on the Palos Verdes Shelf off Long Beach and Los Angeles would not be restored. The bald eagles would continue to die, the fish would remain too contaminated to be eaten and DDT would continue to wreck havoc with the southern California ecosystem through the twentieth century.

Likewise, the Clark Fork River System in Montana would remain despoiled and nonproductive. The heavy metal contamination that has denuded the riverbanks and destroyed the fish would remain. The people of Montana would be denied the use and enjoyment of their natural resources for decades to come.

Fifty million dollars is simply not enough to restore the most massively contaminated sites in this country. Fortunately, the number of such sites is limited but they must be addressed.

H.R. 2500 contains further provisions which limit substantially the ability of trustees to restore our Nation's natural resource heritage. Elimination of nonuse values would also severely hamper our ability to protect the interest of the public.

The focus——

Mr. OXLEY. Excuse me, could you summarize?

Mr. HALL. Okay, thank you.

But, Mr. Chairman, we look forward to working with you on these and a number of provisions to ensure that we meet our goals of reforming Superfund in a reasonable way but still maintaining

our ability to protect the public interest in these vital resources, thank you.

[The prepared statement of Douglas K. Hall follows:]

PREPARED STATEMENT OF DOUGLAS K. HALL, ASSISTANT SECRETARY FOR OCEANS AND ATMOSPHERE, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, U.S. DEPARTMENT OF COMMERCE

Good afternoon Mr. Chairman and Members of the Subcommittee. My name is Doug Hall and I am the Assistant Secretary for Oceans and Atmosphere for the National Oceanic and Atmospheric Administration (NOAA) of the Department of Commerce. With me today is Craig O'Connor, NOAA's Special Counsel for Natural Resources. Throughout this reauthorization process, I have explained this Administration's steadfast commitment to protecting and restoring the nation's valuable natural resources. Today, on behalf of the federal natural resource trustee agencies, I wish to reassert this commitment, and to discuss the potential impacts that H.R. 2500, "The Reform of Superfund Act of 1995," will have on our ability to restore natural resources harmed by releases of hazardous substances and oil. Mr Chairman, we believe that this bill will not protect the precious natural resources that are so very vital to America's economy and our way of life.

Testimony before this Committee has never challenged the basic premise underlying both the Superfund and the Oil Pollution Acts that natural resource restoration should be pursued for natural resources injured by releases of hazardous substances or oil. H.R. 2500 seems to support this goal through a few provisions, such as the inclusion of ecological services in the definition of restoration for the Superfund Act and support of restoration for injuries that persist today, regardless of the date the injuries began. However, these few restoration-friendly provisions are overshadowed by other provisions in this bill.

This bill falls short of recognized goals for Superfund reform, and in large measure will render meaningful restoration impossible. This bill will not contain costs, it will not promote efficiency or cooperation between responsible parties and trustees, it will not foster integration of natural resource protection and restoration in remedial actions, and it will not result in rational restoration. This bill will cause trustees to forego opportunities to restore America's injured natural resources. With its emphasis on cutting costs for the very polluters that have harmed the public's natural resources, this bill effectively reverses the current commitment of the Superfund Act (Superfund) and the Oil Pollution Act (OPA) to restoring resources that are harmed by hazardous substances or oil. Amendments in this bill will prohibit restoration in many circumstances, place arbitrary constraints on the amount and quality of restoration in those instances where trustees can pursue restoration actions, and introduce unreasonable and burdensome procedural impediments to trustees' ability to act on behalf of the public to restore natural resource.

Mr. Chairman, one basic premise of H.R. 2500 seems to be that existing natural resource damage assessment authorities are flawed, and need to be corrected. Mr. Chairman, the Administration does not agree with this premise. We believe that fair and reasonable restorations are routinely achieved under existing authorities as implemented by trustees. Consider the results of the May 11, 1995 study by the General Accounting Office which concluded that over 90% of federal natural resource damage claims to date have been resolved in settlements negotiated as part of the remedial process. Approximately half of these settlements required no monetary payments to trustees. Those damages claims resolved subsequent to remedy selection that required payments or included projects cost responsible parties on average less than $200,000. In documents provided previously to the Committee, we have described the dozens of restoration projects being implemented across this country, such as the Exxon Bayway project in New York and the Greenhill project in Louisiana—projects implemented with responsible party participation. Just this week, work on restoration projects is continuing in Commencement Bay, Washington, and trustees have announced successful progress in habitat creation at the French limited restoration site in Crosby, Texas. The amendments to the natural resource damages provisions contained in this bill will turn back the clock on the lessons learned and the successful approaches developed, and may make projects like these in Washington and Texas impossible.

The amendments to OPA contained in H.R. 2500 are especially disappointing, given the Administration's recently proposed regulations for assessing natural resource damages for oil spills. These proposed regulations essentially codify the successful approaches developed through cooperative assessments performed by responsible parties and trustees. These proposed regulations have received widespread

praise from state trustees and industrial representatives alike, yet H.R. 2500 would negate our ability to assess natural resource damages in an open, cooperative, and cost-effective manner. In order to truly meet your reform goals, we strongly encourage you to consider provisions of these regulations in lieu of the amendments in this bill. The American public should not be asked to suffer the unnecessary losses of their precious natural resources, or to bear the tax burden of reclaiming those resources, that will result if this bill becomes law.

THE CONSEQUENCES OF UNRESTORED NATURAL RESOURCES MAY BE DEVASTATING TO THE AMERICAN WAY OF LIFE AND ECONOMY

Any debate on revising the natural resource restoration provisions of superfund or OPA must be based upon a clear understanding of the gravity and magnitude of the harm to natural resources caused by hazardous substances, and the enormity of the losses suffered as a consequence. The impacts caused by long-term releases of hazardous substances persist for decades, even centuries. Due to the persistence of hazardous substances in the environment, the types of injuries caused by these substances can result in the collapse of populations, food chains, or even entire ecosystems as the substances are transferred from one level of a system to another over long periods of time.

Hazardous substances are toxic to wildlife at extremely low concentrations: PCBs can be toxic at just one part per million, and DOT can be toxic at just two parts per million in the environment. Common effects of a variety of hazardous substances include death, cancer, impairment or prohibition of reproduction or successful birth, impairment of growth, impairment of central nervous system functions, and impairment of normal behavior patterns essential for survival. All types of animals offer these effects from hazardous substance exposure, from lobsters and blue crabs, to striped bass and trout, to Bald Eagles, Peregrine falcons, herons and warblers, to turtles and alligators, to seals and dolphins and Beluga Whales, to humans.

Hazardous substances have already caused vast nationwide degradation of public natural resources. For instance, 80,000 contaminated surface lagoons exist across the country. In 1994, 46 states issued fish consumption advisories or bans due to hazardous substance contamination of fish tissue. Over 1,200 waterbodies across the country were the subject of fishing advisories in 1994, affecting 14% of the nation's lake acreage and hundreds of miles of the nation's rivers. The nature of hazardous substances—persistent toxicity at low concentrations and accumulation in animal tissue—often results in severe ecological impacts occurring over enormous areas distant from discharging facilities, lasting decades or longer. For example: the PCB-based fishing ban in New Bedford Harbor, Massachusetts extends over 26 square miles; over 200 miles of the Hudson River in New York are contaminated by PCBs, causing fishing closures that have been in effect since 1975; an area greater than 1,500 square miles is contaminated with heavy metals in the Coeur d'Alene basin in Idaho; over 1,143 square miles of the Saginaw Bay estuary in Michigan are contaminated with PCBs; mercury-based fishing closures have impacted Lavaca Bay, Texas for over 20 years; and in Montana, over 150 miles of the Clark Fork River are contaminated with heavy metals, including a 25-mile stretch of river that contains no fish at all.

The potential losses to the public and the U.S. economy from injury to productive natural resources could be staggering. Wetlands and aquatic ecosystems—including rivers, lakes, streams, and swamplands—are often impacted by hazardous substances, as they are frequently used as points of discharge. Losses from the public's inability to use and enjoy natural resources due to hazardous substance contamination are also potentially enormous. In 1991, 30 million Americans participated in wildlife viewing, spending $18 billion on these activities, and 14 million hunters spent another $12 billion. One out of 4 adult Americans fished recreationally (84% in fresh water habitats) in 1991, spending over $24 billion on their sport. There is no way to fully compensate America for the loses suffered when injured natural resources and habitats are not restored.

With these values and these potential losses at stake, and knowing how the majority of Americans feel about diminishing protection of their natural resources, we cannot afford to weaken provisions that enable fair and reasonable restoration of the public's natural resources.

AMENDMENTS IN THIS BILL WILL PROHIBIT OR WEAKEN RESTORATION: INJURED NATURAL RESOURCES WILL BE ABANDONED OR LOCAL COMMUNITIES WILL HAVE TO FIND A WAY TO PAY FOR RESTORATION

• Under the Superfund Act, Federal trustees will be prohibited from pursuing restoration for injured natural resources that are managed by the Federal governi

H.R. 2500 grants trusteeship authority to States and Tribes for resources "owned, managed, or held in trust..." by State or Tribal trustees. However, the bill restricts Federal authority to bring claims for restoration of injured natural resources to those resources "owned or held in trust by" the United States. This distinction is clearly aimed at limiting restoration activities by Federal trustees, despite the successful record we have achieved in pursuing cost-effective, negotiated settlements of liability for natural resource damages. The intent may have been to limit costs by preventing situations where double recovery of damages might result. However, this provision will result in more costly restoration at Superfund sites, less effective restoration for resources jointly managed by State and Federal agencies, and a complete lack of restoration for resources that are solely managed by the United States.

NOAA and the U.S. Fish and Wildlife Service play major roles in management of resources such as coastal areas and estuaries, the Great Lakes, endangered species, migratory birds, marine fishery resources and supporting habitats, and marine mammals resources that are not "owned" by the United States, and not clearly "held in trust" by the United States. Some of these resources are managed jointly with States or Tribes, and most of these resources occupy large areas that straddle several state boundaries or state-federal territorial boundaries in the sea.

Precluding Federal trustees from seeking restoration when these resources are injured is wrong for several reasons. First, Federal jurisdiction is necessary to assure that incidents occurring in one state that affect the resources of another state can be adequately dealt with. Second, the Federal trustees have vast experience in this field, as demonstrated by our leadership role in many cooperative assessments across the country; this experience can only make assessments and restoration more efficient and effective. Third, failure to include all parties with management interests in decisions about how or whether to seek restoration will result in conflicting management of resources and possibly even violations of Federal law or policy, to the detriment of the resources. Many state oil pollution or hazardous substance laws require states to coordinate damage assessment and restoration activities with the Federal government, and cooperative memoranda of understanding have been executed or are in draft for several states. Fourth, states may not be able to pursue restoration on their own, for lack of experience or funds, as not all states have damage assessment and restoration programs. Finally, the Federal government has exclusive management authority over certain natural resources, such as fishery resources three miles or more offshore, so these resources may be left without any possibility of restoration by this bill.

This provision may defeat attempts to return productive habitat for migratory tundra swans in the Coeur d'Alene Basin in Idaho. NOAA may be unable to continue to participate in efforts to address serious harm to natural resources caused by mercury contamination in Lavaca Bay, Texas, or injuries caused by DDT and PCBs off the Southern California coast. NOAA and the Fish and Wildlife Service will not be able to continue to negotiate cost-effective natural resource restoration settlements as part of the remedial process under this provision, and costs of restoration settlements at Superfund sites will surely increase. Thus, this provision risks continuing harm to injured natural resources with no apparent gain.

• The overbroad "double recovery" provision would bar many legitimate claims for natural resource restoration.

Existing statutory language prohibits double recovery of natural resource damages for the same release and resource, placing the burden squarely on Federal, State and Tribal trustees to coordinate their actions or risk losing their claims for restoration. This amply protects responsible parties from paying twice for the same natural resource damages. H.R. 2500, however, may prevent any trustee from bringing a claim in the first instance.

This bill defines double recovery to include any recovery under any law if there is a connection with any natural resource injury or loss, regardless of whether those costs were recovered by a designated trustee, whether the costs address all natural resource injuries, or whether the recovery is used to restore the resources.

Under this over broad provision, trustees may be barred from seeking restoration costs if EPA has recovered response costs for a site, even if the remedy will leave massive residual natural resource injuries unaddressed. Cooperative settlements like the marsh restoration project for impacts caused by the French Limited site in Texas will not be possible under this new provision.

Even worse, this provision may bar trustees from seeking restoration of injured natural resources if a commercial fisherman has recovered damages for his private lost profits resulting from injuries to fishery resources. This provision may also bar restoration if a local community has recovered damages for a public nuisance caused by hazardous substance related injuries, such as dead or dying or contaminated wildlife, even though such a recovery would not be used for restoration.

In addition, this change would clearly bar all other trustees from asserting damage claims if one trustee has recovered any amount for any aspect of an injury to natural resources, even if the recovery was only for a narrowly defined claim and is obviously inadequate to restore the injured resources. For example, an Indian tribe's settlement of claims for lost subsistence values of resources on State or Federal land—a narrow claim on behalf of tribal members only—would bar all of the other trustees from recovering the costs of restoring those resources. Thus, the provision would discourage such early settlements and force the trustees into a race to the courthouse to preserve their claims, making it almost impossible to conduct the type of open, cooperative damage assessment and restoration planning process that all parties say they want.

Thus, this over broad "double recovery" provision is in reality a "no recovery" provision that will force Federal, State and Tribal trustees to abanden injured resources, or to file premature claims to protect the public interest in seeking restoration.

• The caps on liability for restoration will result in ineffective restoration, or completely prohibit restoration for the most serious cases of natural resource injury caused by long-term hazardous substance releases.

H.R. 2500 limits liability for natural resource damages to $50 million for all parties, all facilities, and all cumulative releases at sites listed on the National Priorities List (NPL), and to $50 million for "the entire contiguous area" for sites not on the NPL.

This limitation might not work such a draconian result at most NPL sites, where remedial actions may effectively eliminate injuries to natural resources or minimize the residual injuries requiring restoration. However, for "contiguous areas of contamination" outside of NPL sites, this limitation is arbitrary, bearing no relation to the number of parties that discharged wastes to an area, the volume of releases or number of different hazardous substances involved, the seriousness of natural resource harm, the size of the area affected, or the magnitude of losses that will be suffered by local communities and the public at large if injured natural resources are not restored.

This limitation will prevent meaningful restoration for the most severe cases of natural resource injury, or worse, prohibit any action in those cases where spending such a low sum would constitute a futile action. Thus, in the cases of massive, long-term natural resource injury—the Coeur d'Alene basin, the Palos Verdes Shelf, the Hudson River, the Clark Fork River, LCP Chemicals—these resources may not be able to be actively restored. In effect, the cap means that those who have spread pollutants over the widest area and caused the most harm will pay the smallest part of the damages resulting from the injury they have inflicted on the public's resources.

Although H.R. 2500 includes a provision allowing trustees limited access to the Superfund for damage assessment costs or the costs of restoration that exceed the $50 million cap, this funding mechanism will not provide for full and meaningful restoration for several reasons. First, monies for damages must be appropriated, and thus are not certain to be available at all, or available in a timely manner for restoration. Second, the requirement that trustees exhaust all "legal" or "administrative" avenues before seeking damages from the Superfund is ambiguous and will promote litigation. Finally, the amounts authorized in the bill for assessment and restoration are inadequate to address the increased incidence of natural resource injuries that will result from provisions in this bill, including the cap on the number of sites that will be placed on the NPL for cleanup, and the much lower standard for protection of the environment required of remedial actions.

• Repeal of liability for impairment of passive or nonuse values under compensates the public.

It is undeniable that Americans value natural resources for themselves, for their existence, as part of what makes this a great Nation with a valuable heritage to pass on to future generations. The intrinsic values of wildlife—their physical, biological and chemical characteristics, their colors, their sounds, their smells—contribute deeply to the American way of life. Indeed, passive or nonuse values can be far more significant than the benefits of using a resource. Yet, this bill explicitly prohibits recovering compensation for lost passive or nonuse values, regardless of the method used to calculate them. Thus, the public will not be fully compensated for actual losses resulting from releases of hazardous substances or oil. For example, this bill might prohibit trustees from taking actions to fully restore a bald eagle population off the southern California coast, despite the tremendous existence value all Americans place on this species. This is an unfair retreat from the "polluter pays" principle—a vital concept at the core of both the Superfund and the Oil Pollution Acts.

• Limiting liability and restoration to "measurable and ecologically significant" functions of resources, threatens further disintegration of the nation's natural resource base.

These provisions of H.R. 2500 appear to respond to the assertions of some industrial representatives that Federal, State and Tribal trustees seek restoration to unrealistic, pre-industrial, or pristine standards. As we have demonstrated previously, these assertions are unfounded, thus these amendments will needlessly jeopardize America's natural resource base. Trustees seek only to restore injured natural resources to the condition they would have been in today, but for the release of hazardous substances or oil.

The effects of limiting liability to injury to the "measurable and ecologically significant functions" of natural resources, and limiting restoration to actions that are "reasonable and necessary" to return those functions to the baseline condition, may result in massive losses of natural resources in several ways. First, the undefined term "ecologically significant functions" is likely to increase, rather than decrease, litigation. Second, and more importantly, the current state of ecological science does not allow identification, much less quantification, of all the functions provided by our natural resources today, and cannot divine what their potential uses will be in the future. The only way to ensure that all of the functions and values provided to society by natural resources are reinstated is to put the resources back in the condition they would be in today, but for the release.

Reducing injured natural resources to a catalogue of functions for identification of restoration alternatives will likely result in continued depletion of our natural resource base, as cheap substitutes for resources are offered up as providing the same "functions." For example, how can trustees contest that wooden fence posts with wooden boxes would not be a fitting restoration of the roost and nesting functions provided to birds from vegetation killed by hazardous substances? In the Hudson River, will the trustees be prevented from seeking compensation for the lost recreational fishing opportunity because fishermen are allowed to catch fish, even though they are not permitted to keep or eat their catch? Similarly, if "ecologically significant functions" are defined to include only those functions directly used by humans, or functions only important at the population, community or ecosystem level, injured natural resources will be sacrificed. Injuries to natural resources should not be required to be catastrophic before liability for restoration is imposed.

As the example of rain forest pharmaceuticals shows us, natural resource services that cannot even be identified today may become invaluable in the future. We cannot afford to sell cheaply our options for future resource uses because we do not have complete understanding today. Restoring natural resources to their baseline conditions maximizes the likelihood that functions and services will be generated. This workable approach should continue to be the foundation of our national policy for natural resource restoration.

• The definition of "cost-reasonable" will require economic analyses of restoration options with too narrow a scope and favors no restoration, regardless of the magnitude of interim losses to the public.

Restoration actions under this bill must be beth "cost-effective" and "cost-reasonable."[1] In the case of oil spills, only the most cost-effective and cost-reasonable restoration plan may be implemented. Although these terms may appear on the surface to be innocuous, such cost considerations alone provide an inadequate basis for selecting restoration alternatives. Further, the definition of cost-reasonable in the bill represents a boon to responsible parties at the expense of America's natural resources.

Cost-effectiveness and reasonable balancing of costs and benefits are worthy goals for natural resource restoration, and trustees currently consider cost among a suite of other factors designed to provide a restoration outcome in the best interests of the public. However, this bill undermines the reasonableness of evaluating cost in selecting restoration alternatives with the form of the cost-reasonableness requirement defined in the bill.

The bill mandates that trustees perform a whole series of complex and likely costly economic analyses for each alternative. Monetizing the full value of natural resources can be a difficult and controversial exercise. Yet, under this bill, if the cost of active restoration exceeds the economic benefits by one cent, no restoration may be undertaken. Further, due to the bill's prohibition on recovery of nonuse values, trustees may not be able to measure all the benefits provided by resources, although they will be required to measure all costs. Consequently, many active restoration measures may not pass the cost-reasonableness test as defined in the bill.

[1] Under both statutes restoration actions must also be "timely," but timely is rendered meaningless due to the circular reference to cost-effective and cost-reasonable used in the definition.

The likely outcome of this provision will be selection of natural recovery as the only available option to address long-term natural resource injuries, regardless of the severity of those injuries. Due to the persistence and toxicity of hazardous substances and oil, natural recovery may take decades or centuries, if it is possible at all. Local communities will thus suffer the losses resulting from natural resource injuries for years. This is an unfair retreat from the "polluter pays" principle.

• Amendments create a new exemption from liability, may eliminate liability for injuries caused by remedial actions or by indirect effects of oil spills, rolling back current practices holding responsible parties liable for all consequences of their actions in releasing hazardous substances or oil into the environment.

H.R. 2500 creates an exemption from liability based solely on compliance with any permit, without requiring an environmental analysis that identifies and rationally weighs the consequences of impacts to natural resources. The bill places no limitations on the type of permit that would qualify for this exemption, thus any permitting entity can completely undermine Federal law protecting the public and natural resources from hazardous substances.

The bill also adds the Final Record of Decision to the list of documents that may irretrievably commit natural resources to loss, providing a new exemption from liability for restoration. This may result in a significant portion of natural resource injuries at superfund sites being abandoned. This provision may be read to bar restoration for resource injuries that are caused by remedial actions, even though those actions would not have been needed had a release of hazardous substances not occurred. Restoration might even be barred if a "no action" remedial alternative is selected. Most seriously, if the injury is identified in the Record of Decision, this provision might bar restoration of injured natural resources even if the selected remedial action was not intended to address that harm.

An exemption from liability based on a record of decision is not supported by the rationale underlying the natural resource damages provisions, nor consistent with the reasoning for granting an exemption based upon an environmental impact statement (EIS). The basic theory behind including a natural resource damage cause of action in Superfund was that remedial actions alone will sometimes be insufficient to cure serious environmental degradation. This amendment would write off such degradation without an analysis of the feasibility or cost-effectiveness of restoration. Further, an EIS represents a planning process that occurs before an action is executed, so all interested parties, including the public, may balance the positive and negative factors before taking action that might harm the environment. In contrast, a record of decision occurs after the harm has already occurred, without benefit of an environmental analysis or permit.

The bill's amendments to the Oil Pollution Act restrict liability to the direct results of discharges of oil. As with the above changes to the Superfund Act, this will repeal liability for injuries caused by necessary response activities, such as fishery and beach closures, or burning marshes to remove oil from the environment. Of equal concern is the possibility that this provision, read literally, will provide an exemption from liability for injuries caused indirectly by discharges from oil, such as death or injury to wildlife caused by ingestion of oiled fish. Again, an exemption from liability for these foreseeable consequences of an oil spill would be an unreasonable boon to polluters, and an unfair burden on the public.

• Federal, State and Tribal trustees will be barred from pursuing restoration until completely new damage assessment regulations required under this bill are promulgated and become final.

Despite the fact that years of study and effort have gone into promulgating regulations under the Superfund Act, and that widely supported regulations have recently been proposed under the Oil Pollution Act, this bill would require promulgation of new regulations with excessively burdensome requirements. Because these new regulations will be mandatory, no claims may be brought, and no restoration pursued, pending the re-promulgation and years of court challenges to those regulations. This complete shut down in restoration activities unnecessarily threatens massive losses to the nation's natural resource base.

AMENDMENTS IN THE BILL WILL CREATE AN EXPENSIVE, BURDENSOME, AND LITIGATION-ORIENTED NEW PROCESS

• New regulations required under the bill impose costly, time-consuming standards.

The requirements that this bill imposes on the structure of regulations will limit trustees' ability to assess injuries and restoration requirements for a great number of sites, and result in more costly and protracted assessments at those sites we are able to pursue.

The "generally accepted" limitation will quash innovation for unique and particular circumstances, and will result in more costly and protracted assessments being performed than are necessary, for fear of failing this burdensome standard. This requirement represents a higher standard for evaluating scientific and technical data used in assessment of natural resource injuries than is required for admission of scientific data by the Courts. Some of the most successful, most cost-effective restoration-based settlements under the Superfund Act and the Oil Pollution Act have resulted from creative development of assessment methodologies by trustees and responsible parties working cooperatively. These methods, which focus on determining the type and amount of restoration necessary for the injuries at hand, will not necessarily meet the strict "generally accepted" standard imposed by this provision.

The bill also contains an illusory exception to the requirement to use only the procedures contained in the new regulations—that is, if the alternate procedures are guaranteed to produce a more cost-effective and more cost-reasonable restoration plan. How can trustees know whether an assessment will produce a lower cost restoration plan without fully implementing the assessment? Assessment methods should be chosen for their validity, reliability and efficiency in determining the type and amounts of restoration necessary for a given incident, not on whether they produce a cheaper restoration plan.

• Repeal of the rebuttable presumption for assessment performed in accordance with the new mandatory regulations will foster costly, litigation-oriented assessment, and quash cooperation between responsible parties and trustees.

If trustees are required to perform assessments in accordance with new regulations, then trustees should receive the benefit of a rebuttable presumption of correctness for those assessments in any court challenge to the trustees' claims. Repeal of the rebuttable presumption renders the administrative assessment process established by the regulations wasteful, when a reviewing court will determine anew the facts of injury, causation, quantification, and appropriate restoration. Assessments will now clearly be geared to the courtroom, instead of to achieving rapid restoration in a cooperative fashion with responsible parties. Assessment studies will be expensive and time-consuming, numerous experts will be retained, secrecy will prevail. This is not an effective way to achieve restoration of the public's natural resources.

• Requiring a lead decision-making trustee for oil spill incidents restricts trustee jurisdiction and may foster uncoordinated races to file lawsuits.

The Federal, State and Tribal trustees have a successful record of cooperative decisionmaking. There is no need to mandate a lead decisionmaking trustee. Each trustee has unique and valuable experience to bring to the process, and protects unique interests on behalf of the American public. This mix of input is vital to rational, effective, and efficient restoration. No changes should be made to the existing laws that would undermine this natural pressure to cooperate.

THIS BILL UNNECESSARILY UNDERMINES RESTORATION OF INJURED NATURAL RESOURCES

The value of natural resources to this nation's well-being is unquestionable: they feed us, they clothe us, they shelter us, they provide our medicines, they entertain us, they soothe our souls. They absorb our pollutants. The importance of healthy natural resources to the public is unassailable. This treasured heritage is finite yet dwindling, and we cannot afford to allow unnecessary losses of natural resources by ignoring opportunities to achieve cost-effective restoration of resources injured by releases of hazardous substances or oil.

H.R. 2500 will in many instances bar Federal, State and Tribal trustees from bringing natural resource damages claims to achieve restoration of natural resources injured by hazardous substance releases or oil in many instances. To the extent restoration is not barred, the bill arbitrarily limits the amount and quality of restoration that can be implemented, and imposes costly and burdensome procedural requirements on trustees that will delay restoration, increase transaction costs, and promote more litigation.

The severe restrictions imposed by this bill on restoration are unnecessary. Current trustee practices embody a fair, open, efficient, cost-effective process geared at achieving a proper restoration and avoiding litigation. The Interior Department's regulations established stringent standards for determining whether an injury to natural resources has occurred, and provided a framework for developing a publicly reviewed restoration plan. Moreover, the natural resource damage assessment process is being continually improved. The Administration's recently proposed regulations for assessing natural resource damages from oil spills offer a better answer than the House bill. The focus of the regulations is the direct restoration of injured resources: costs are controlled by basing claims on the identification of restoration

projects rather than on demands for sums of money. Trustee discretion is limited by requiring consideration of a range of feasible restoration alternatives, including natural recovery, and by inviting the responsible party and the public to participate in assessment and implementation of restoration. Restoration is limited to necessary measures by requiring determination of injury, and restoring only to baseline conditions.

Maintaining the trustees' ability to effect meaningful restoration of injured natural resources is vital to this nation's well-being. We would be happy to answer any of your questions now, and we would welcome an opportunity to work with you to address the problems we have identified with this bill.

Mr. OXLEY. Thank you. Mr. McHugh.

STATEMENT OF MARTIN J. McHUGH

Mr. MCHUGH. Good afternoon, Mr. Chairman and members of the subcommittee. Thank you for the opportunity to testify regarding the natural resource damage provisions of H.R. 2500.

I am Martin J. McHugh and I direct the Office of Natural Resource Damages for the New Jersey Department of Environmental Protection. This testimony is presented on behalf of the State of New Jersey and the Association of State and Territorial Solid Waste Management officials. Title IV of H.R. 2500 is critical to the reauthorization since the majority of States rely on CERCLA's NRD provisions for restoration of our country's natural resources.

As such, ASTSWMO and New Jersey have endeavored to provide constructive and balanced input over the recent months and your staff has been available and open to our views on this title.

In general, while H.R. 2500 places new restrictions on natural resource trustees, it will still provide for a degree of primary restoration for injuries to natural resources caused by these sites.

Today, I will highlight the workable areas of title IV and provisions which need to be refined to further our goals. I will briefly focus on 7 issues.

First, the provision dealing with State trustee jurisdiction provides adequate flexibility to account for differences in State law authority over natural resources. For instance, States may own or manage their resources, however while title IV supports trustees in this respect, this section should enable restoration for injuries resulting from threatened releases. Closures and restrictions on the use of fisheries, bathing areas and other resources have been imposed on the basis of threatened releases. We recommend that title IV be revised to reinstate the concept of threatened releases.

Second, title IV supports the current trustee initiative to make restoration the primary focus of the assessment process. It appropriately recognizes ecological and public use values as well as the time period until recovery as critical components of the restoration process.

Third, title IV also recognizes that the cost of restoration at some large and complex sites will exceed $50 million. We have previously testified that restoration should not be capped further in a new law but the proposed $50- to $100 million to be set aside is a step toward meeting this restoration challenge. However, in light of the current and potential sites that may exceed the cap, additional funding may be required to avoid shifting the burden of restoration or the consequences of the damages onto the American taxpayer. We would be happy to work toward developing the best method for making these funds available.

Four, simplified assessment techniques enable trustees to avoid time consuming and expensive studies at every site. This promotes the reauthorization goals of cost containment and cost effectiveness. Title IV appears to codify these cost savings tools which we commend.

Five, cost containment can further be accomplished by integrating natural resource damages into the remedial process. Reauthorization presents a unique opportunity to resolve a concern of all stakeholders and that is the coordination of restoration and remediation. Current coordination is hampered by EPA's lack of access to the fund. Coordinating natural resource damages early on in the remediation process decreases transaction costs and NRD liability at a site, provides closure for responsible parties at the end of a cleanup and it promotes timely and cost-effective restoration. It also eliminates the perception that cleanup agencies and trustees work to back door remediation through the NRD program.

Integration takes on greater importance considering title IV's proposal to restrict NRD liability for damages identified at the record-of-decision stage. Without full trustee involvement in the remediation process, this provision could force a writeoff of significant portions of restoration at sites throughout the country.

Six, the statute of limitations is arguably one of the most vague and ambiguous areas of the law and it needs to be clarified. We understand the necessity to balance the needs of both responsible parties and trustees and therefore we propose the following compromise: Upon signing of the ROD, trustees will have 1 year to commence the assessment process and upon completion of the assessment, the trustees will have 1 year to file the claim. Part of the problem caused by the statute of limitations can be resolved by a revision to allow trustees access to the fund to perform assessments within the stipulated time period.

Lastly, State waste managers cannot support the proposed definitions for cost effective and cost reasonable. The current language defining cost effective misses the critical component of basing the cost test on restoration techniques which already have been screened for effectiveness. The cost reasonable definition fails to account for the need to compensate the public for the full lost use of a resource during the proposed comparison of incremental cost and incremental benefits. Therefore, we recommend a revision to the cost reasonable definition to ensure that costs can exceed the restoration value but not be grossly disproportionate.

Ultimately, our level of comfort for this title will be based on a large part on the outcome of these definitions. In conclusion, we believe the title has evolved significantly and we look forward to working with you and your staff. Thank you and I am available for questions.

[The prepared statement of Martin J. McHugh follows:]

PREPARED STATEMENT OF MARTIN J. MCHUGH, DIRECTOR, OFFICE OF NATURAL RESOURCE DAMAGES, NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, ON BEHALF OF THE ASSOCIATION OF STATE AND TERRITORIAL SOLID WASTE MANAGEMENT OFFICIALS

Good morning. I am Martin J. McHugh and I direct the Office of Natural Resource Damages for the New Jersey Department of Environmental Protection. This testimony is presented on behalf of Robert C. Shinn, Jr., the Commissioner of the

New Jersey Department of Environmental Protection and the Association of State and Territorial Solid Waste Management Officials (ASTSWMO), a non-profit association representing the collective interests of waste program directors of the nation's states and territories. Besides the State clearup and remedial program managers, ASTSWMO's membership also includes the State regulatory program managers for solid waste, hazardous waste, underground storage tanks, and waste minimization and recycling programs. The ASTSWMO membership is drawn exclusively from State officials who deal daily with the many management and resource implications of the State waste management programs they direct.

Over the past few months representatives from both ASTSWMO and New Jersey have strived to work cooperatively with your staff and to provide constructive and balanced input. This title is particularly important to State Waste Programs as the majority of States currently utilize the federal CERCLA Natural Resource Damages provision rather than State law at non-NPL sites. Consequently, we view this title as critical to the States' ability to carry out the important task of restoring natural resources injured by contaminant releases. In general, while H.R. 2500 places new restrictions on trustees, it will still enable trustees to continue to provide a level of primary restoration for injuries to natural resources caused by these sites.

We recognize that Natural Resource Damages is perceived by some to be a particularly controversial area of the Superfund program due to a small number of large, high profile sites. As such ASTSWMO commends your staff on the openness they have shown during this process and their willingness to engage in constructive discussions to try to craft a title which is based on the experiences associated with the majority of sites.

Today, I would like to provide ASTSWMO's and New Jersey's overall assessment of the Natural Resource Damages title and to offer a few recommendations for its continued improvement.

Let me begin by highlighting the workable areas of H.R. 2500 and move into the areas that we believe can be further refined and conclude with the areas which must be altered in order to be acceptable to waste managers.

Workable Provisions:

Fifty million cap on restoration: First, ASTSWMO's position has been that natural resource damages should not be further capped under a new law. We appreciate that the Chairman has recognized that some large and complex sites will simply warrant expenditures in excess of $50 million in order to be adequately restored and that these costs should not be shifted to the American taxpaying public. We believe the proposed $50 to $100 million fund to be set aside each year to address these particularly large and egregious sites will help somewhat to meet this important restoration challenge. However, these sites plus other potential sites may still warrant additional funds. We will be happy to work with you on developing the best method for allocating these funds when they are appropriated.

Definition of restoration: second, we appreciate the importance that H.R. 2500 places on restoration of natural resource injuries associated with hazardous sites. Title IV is an endorsement of the natural resource trustees' initiative as seen in the proposed OPA rules to make restoration the primary focus of the assessment process. The term "restoration" has been the subject to much interpretation throughout this reauthorization process and H.R. 2500 is the first attempt at clarification, namely that both ecological and public use functions shall be restored and that they shall be restored in a *timely* manner. Trustees have interpreted "restoration" to encompass actions to directly rehabilitate the very resources that were injured by releases, and if that is not possible, actions to replace or acquire the equivalent of the resources lost.

Trustee jurisdiction: Third, we are pleased to see that this title provides adequate flexibility to account for differing State laws in the area of State jurisdiction. By incorporating the concept of State trustee authority for resources "owned, managed or held in trust", H.R. 2500 continues to be flexible and protect against the preclusion of restoration claims simply because jurisdiction varies from State to State, i.e., some States "own" their groundwater, while others may "manage" their resources.

It is also equally important, however, for H.R. 2500 to provide flexibility that accounts for the differences in the kind of natural resource injuries that may occur from releases or threatened releases. Current law specifically references the concept of "threatened releases" while H.R. 2500 appears to have omitted this concept. For example, while an actual release has the ability to cause the closure of a State resource such as a park or bathing area, it is also possible for a threatened release to cause the same natural resource injury. This was the case in the Santa Clara incident when a container ship lost a significant load of arsenic trioxide off the coast of New Jersey. A commercial and recreational fishing area had to be closed as the

Coast Guard searched for the numerous containers of this very toxic substance, to determine if the containers could be retrieved in the deep ocean waters, and if they had leaked. This closure of fishing grounds resulted from a threatened release from these containers and caused a true damage to a public resource. ASTSWMO recommends that the title be revised to reflect current law regarding threatened releases.

Simplified assessments: Lastly, cost containment and cost effectiveness has been achieved in the current Superfund's natural resource damages process through the use of simplified techniques to assess injuries. ASTSWMO appreciates what it believes to be the intention of the drafters to preserve the ability to use simplified techniques, as evidenced by the inclusion of language in H.R. 2500 that allows for the use of "methodologies and literature to achieve cost-effective assessments." The use of expedited techniques has always been based on site-specific information regarding actual site conditions and the trustee use of these techniques indicates their concern with avoiding unnecessary costs associated with time consuming studies. The elimination of simplified assessment techniques would definitely increase the costs of assessments and lengthen the time to settlement at a site.

We believe there is a misconception that trustees use models and literature to meet the causation requirement without even visiting the site of the release. This is simply not true. Current DOI rules and the rules proposed pursuant to OPA both expressly require that a trustee must initially confirm that a release has caused an injury prior to undertaking an assessment. Therefore, although we question the necessity of its inclusion in H.R. 2500, it is clear that this title's provision setting forth a new causation standard expressly addresses the myth that simplified assessment techniques will be used by trustees to circumvent causation.

Recommended Improvements:

Statute of limitations: Arguably, one of the most vague and ambiguous areas of the law is the CERCLA natural resource damages statute of limitations provision. We believe this provision must be clarified in order to significantly improve the program, prevent unnecessary litigation and provide certainty to both the trustees and responsible parties, and compensate the public in a timely manner. We understand the current tensions between responsible parties and regulators and the need to balance the interests of both. Responsible parties want assurances that the NRD assessment process will have an end point. However, the trustees *need* sufficient time to be able to perform thorough assessments in order to accumulate as much pertinent information as possible before filing a claim. One compromise solution which could meet the goals of both interests is the following: upon the signing of a ROD, a trustee will have one year to begin a natural resource damage assessment and upon completion of the assessment, the trustee will have one year to file a claim. We believe this may serve to meet the needs of both parties as well as the public, and to streamline a highly ambiguous area of the law.

Integration of NRD into the CERCLA remediation process: In order to fully address the concerns of responsible parties and enable trustees to conduct assessments in a timely manner, it will become even more critical for trustees to have access to the fund for addressing NRD. If the current prohibition of using the fund for assessments is lifted, trustees will have the resources readily available to accomplish NRD assessments in a more timely manner.

The integration of natural resource damage assessment issues into the CERCLA remediation process particularly at the stage of the Remedial Investigation and Feasibility Study process (RI/FS) is an additional benefit of allowing the fund to be used for assessments. Addressing natural resource damage issues early on in the RI/FS process would decrease transaction costs, reduce ultimate damage liability at a site and provide the finality that responsible parties desire. Significant cost savings can be realized by responsible parties through facilitating trustee involvement early on in site investigations so that data characterizing resource concerns can be obtained while personnel are mobilized and in the field. Resource data collected early in the process can enable the trustees to aid in the design of the remedy during the feasibility study stage that will be more protective of and less damaging to natural resources. In fact, at this point, trustees may even be able to recommend on-site restoration measures that can be undertaken during remedy construction to "build restoration into the remedy". This kind of creative approach will directly offset natural resource damages that may have already occurred. Thus, an integrated process facilitates prompt resolution of natural resource damages as part of an overall settlement at a site and promotes timely and efficient restoration: a shared goal of trustees and industry.

Integration of NRD into the remedial process becomes of paramount importance since H.R. 2500 proposes to eliminate NRD liability for those damages identified in

the final record of decision. Without trustee involvement during this stage of the remediation process, we must caution that this provision will become unacceptable to State Waste Managers as it could force trustees to essentially "write-off" significant portions of restoration at sites throughout the country where there has been no trustee involvement. It is not sensible nor is it equitable to the public to make critical resource decisions without the natural resource experts being present during the assessment process.

In addition to the need for trustee access to the funds for integration purposes, previous ASTSWMO testimony stated that EPA needs to be able to coordinate with the trustees in order to truly streamline the process. Current law restricts EPA's use of the Superfund for NRD activities and it is primarily due to this prohibition that trustees have difficulty getting inserted into the CERCLA remediation process.

CERCLA should, therefore, be amended to remove the SARA restriction on EPA and require that NRD be integrated into the remedial process for the benefit of the responsible parties, the cleanup agencies and the general public who will gain from more timely and efficient restoration of injured resources. In addition, the NRD assessment would be assured to be consistent with the remedy selection process.

Interim losses: Lastly, as this title indicates, natural recovery is still an acceptable restoration alternative that may be considered by trustees as part of an overall restoration strategy. Trustees agree that there are cases where natural recovery may prove to be the most cost-effective and practical strategy for restoring injured resources—particularly in the case of oil spills. And therefore, we seek clarification as to whether H.R. 2500 will still provide for the ability to compensate the public for "interim losses". It is important to understand that using natural recovery as the restoration option instead of more active methods (e.g., planting marsh grass) can result in a significantly longer time period until restoration is achieved. During this time period, the injured resource is either not functioning to its normal capacity or is not providing the services it would have provided in the absence of the release. Thus with natural recovery, the public will continue to experience a degree of loss despite any incremental improvements in the resource over time. It is for this reason that consideration of "compensatory" restoration as an additional means becomes critical. When trustees implement a natural recovery approach (e.g., fencing off an area to let it recover), the objective of compensatory restoration is to provide the public with substitute resource services that will compensate for "interim losses": the incremental losses suffered during the time period it takes for a resource to be restored.

It is for the above stated reasons that State waste managers seek to ensure that this title will preserve the ability of the trustee to obtain compensatory restoration for interim losses. The H.R. 2500 definition of restoration is limited to "reestablishing functions" and "public uses". It seems that this wording could be interpreted to prohibit restoration action beyond measures taken to directly restore the injured resource, thus precluding compensatory restoration. This seems especially true, considering the deletion of the current language in Section 107(f)(1) which states that recoveries are *not limited* to "restoring or replacing resources". We recommend the Chairman clarify this potential for misinterpretation and reinsert the current language in Section 107(f)(1).

Unacceptable provisions:

ASTSWMO and New Jersey are very concerned with the proposed definitions of "cost-effective" and "cost-reasonable" as they are defined in this title of H.R. 2500. While State Waste Officials are also cognizant of the need to contain costs and streamline the program, we can not condone inclusion of definitions which are designed to relegate all restoration projects to the lowest common denominator, namely natural recovery. The concept of selecting the least costly of two similar restoration alternatives that achieve similar results is sound, however, the definition fails to qualify that the restoration alternatives to be considered should *only* be those that are selected by the trustees in accordance with certain criteria designed to ensure the effective achievement of restoration in an acceptable time period. Basically, a cost-effectiveness test, should only be applied on restoration alternatives that have already undergone a screening process. For instance, it may be cheaper to provide increased public access at other streams to restore for chronic injuries to trout fisheries instead of rehabilitating the trout habitat of the stream actually injured by a contaminated site. However, unless the former alternative was selected for reasons in addition to cost (i.e., that the habitat could not be manipulated to encourage growth of native stocks), it may not be acceptable. If the trustees were always forced by cost to forego habitat rehabilitation for such injuries, the country's landscape would be dotted with dead streams and the remaining productive streams would become overfished.

State waste managers are concerned that the new statutory provision creates an overriding requirement and will result in the selection of restoration alternatives based purely on a cost basis rather than on *cost plus the effectiveness of the restoration technique.* Considering our concerns regarding limitations on compensatory restoration, this provision should be clarified so that the cost-effectiveness test applies only after a restoration alternative has undergone a selection process that incorporates analysis of an alternatives' effectiveness.

ASTSWMO also has concerns regarding the imposition of a cost-reasonable test that will seek to weigh the incremental costs of the selected restoration alternative to the incremental benefits of such alternative on a strictly one to one basis. The proposed definition would forbid the selection of an alternative when the costs of restoration would exceed the value of the benefits that will be provided by the restoration. It is already a difficult proposition to quantify the full benefits of natural resources and any restoration project considering the complexity of ecosystems. For instance, a bait fish population that is destroyed by a discharge has value not only for the game fish that fishermen seek, but also for the ecosystem as a whole. It is our belief that in most instances, the benefits will end up being undervalued in comparison to the costs. Finally, since the cost reasonable definition refers to "reestablishing various degrees of services *up to baseline*" it indicates that interim losses and thus compensatory restoration are not part of the benefits analysis. The public, therefore, may not be fully compensated with this approach. We recommend that the Subcommittee reinstate the existing standard that restoration costs cannot be "grossly disproportionate" to the value of the benefits provided by the resources.

We believe these definitions are a critical issue in this bill as they form the foundation for interpretation of the remaining sections. Ultimately, our level of comfort for this title will be based on the outcome of these definitions. We look forward to working with you to clarify and incorporate these concepts.

Conclusion:

In conclusion, the Natural Resource Damages provisions contained in H.R. 2500 have evolved to make this title more workable and an integral part of the effort to streamline the Superfund program. We have appreciated the open process exhibited by the efforts of your Subcommittee these past few months and we look forward to continuing our cooperative working relationship with you as you seek to further refine the Superfund program during reauthorization. We trust that as these reforms take shape, that State Waste Managers will be able to continue to find this an implementable title and we will continue to work with you to achieve that outcome. Thank you for your time and consideration and I will be happy to answer any questions you may have.

Mr. OXLEY. Thank you, Mr. McHugh.

Mr. deSaillan.

STATEMENT OF CHARLES deSAILLAN

Mr. DESAILLAN. Thank you. Good afternoon, I am Charles deSaillan, Assistant Attorney General for Natural Resources for the State of New Mexico. I am testifying today for New Mexico Attorney General Tom Udall and on behalf of the National Association of Attorneys General, of which Mr. Udall is the president.

We very much appreciate the opportunity to testify here today on the proposed reform of Superfund Act.

Mr. OXLEY. Would the gentleman yield just a second?

What relation is he to Mo Udall?

Mr. DESAILLAN. Mo Udall is his uncle, Stewart Udall is his father.

Mr. OXLEY. Okay, thank you.

Mr. DESAILLAN. This legislation is extremely important to the attorneys general and to the State of New Mexico. Although we support many provisions of the bill, we have deep concerns about many of the other provisions of the bill.

I realize that the topic of this particular panel is natural resource damages and I will focus most of my remarks on that issue, I want

to mention a number of other aspects of the bill that we feel are of particular importance.

First, we have an overall comment. Among the primary goals of Superfund reauthorization are to reduce litigation, reduce transaction costs and to speed up the pace of cleanups. Unfortunately, many of the provisions of this bill are inconsistent with these goals. The bill represents a nearly complete rewrite of the CERCLA statute. The cleanup standards, the liability standards, the standards for restoration of natural resources all would be changed radically and in innumerable ways.

Many of the changes, it seems, are not designed to fix specific articulated problems with the law but rather seem to be changes simply for the sake of changes. Many new and key terms would be added to the statute. But these terms are vague and poorly defined or not defined at all and all of these changes, all of these vague terms, will need to be interpreted first by the implementing agencies and then in all too many instances by the courts.

It seems painfully obvious to us that the result will be the diversion of Agency resources to writing interpretative guidance, nullification of 15 years of hard-fought legal precedent, further litigation, further transaction costs and further delay in cleanup. I strongly suggest that the subcommittee look carefully at the proposed amendments and go only with those amendments that are truly necessary.

There are a number of provisions of the bill also that will result in further delay in cleanup, some of which were mentioned this morning. First, the bill would eliminate from current law the bar on preenforcement review. The bill would also allow remedy decisions to be reopened to conform them to the new cleanup standards. The bill would also create a complex and lengthy allocation process that would take upwards of 2 years to complete and it would take an approach of allocate first and cleanup second.

We are also very troubled by the tremendous relaxation of cleanup standards. Perhaps most troubling of all are the provisions addressing groundwater cleanup. When these provisions are taken together, we conclude that actual cleanup of groundwater will rarely be warranted. This is a very important issue for the State of New Mexico which has depleted groundwater resources. It is an arid State, we are developing very rapidly and our groundwater resources are particularly precious to us.

On the positive side, we are very pleased that the bill would largely retain so-called retroactive liability and we strongly support this aspect of the bill.

Regarding the natural resource damage provisions of the bill, we recognize that these provisions have been changed substantially from earlier discussion drafts that were circulated. Many of these changes were in response to our comments and we very much appreciate the openness of the subcommittee in listening to our concerns. Notwithstanding these positive improvements, everything in the natural resource damages title, and this is not an exaggeration, everything in the title is designed to limit liability for natural resource damages or to limit trustee authority. The bill would effectively cripple our program. I will highlight a few of the most troubling provisions.

First of all, using vague and undefined terms, the bill would severely limit the types of resources for which damages could be recovered. Thus, only measurable and ecologically significant resources would be covered. What do these terms mean? What is the specific problem that this language was designed to address? I don't know the answer to these questions but I do know that this language would cause us problems and it would cause us litigation. I am fully confident that Mr. McKnight can construct a very persuasive argument that a deep underground aquifer, for example, is not an ecologically significant resource.

Similarly, only public resources would be covered. Is an aquifer that provides drinking water to a subdivision of private residences a public resource? I don't know. But it is certainly arguable that it is not.

The bill would dramatically change the application of the $50 million cap on liability. It would eliminate the authority of trustees to recover fully the damages at those few sites where natural resource damages and destruction have been the most severe. Injured resources at sites like Montrose in California, Clark Fork in Montana and Bunker Hill in Idaho would go unrestored. I would like to clarify a point that was made this morning on the application of the cap that came up in a discussion between EPA administrator Browner and Congressman Tauzin.

Mr. OXLEY. Could you summarize, please, Mr. deSaillan?

Mr. DESAILLAN. Yes, I'm sorry.

Anyway, on this cap issue under current law, the cap does not apply if the release is the result of willful negligence. Under this bill, that exception to application of the cap would be deleted.

The bill also fails to address the statute of limitations and it fails to provide for judicial review of trustee decisions on administrative record, both of which are proposals that we have made in the past.

That largely concludes my statement. Thank you and I will be happy to answer any questions you have.

[The prepared statement of Tom Udall was submitted for the record:]

PREPARED STATEMENT OF TOM UDALL, ATTORNEY GENERAL, NEW MEXICO, ON BEHALF OF NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

Mr. Chairman, members of the Subcommittee: I am Tom Udall, Attorney General of New Mexico. I am President of the National Association of Attorneys General ("NAAG").

I appreciate the opportunity to appear before you today on behalf of NAAG and provide our views on the proposed Reform of Superfund Act of 1995 ("ROSA"), which would amend and reauthorize the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), commonly known as Superfund. This proposed legislation is of extreme importance to the State of New Mexico, and to many of the members of NAAG.

Although I understand that I will be appearing before your Subcommittee as part of a panel addressing natural resource damages, I will not limit my statement to the natural resource damage provisions of ROSA. Rather, I will address each of the ten Titles of the bill, in turn.

While we strongly support certain aspects of ROSA, we are very concerned with many of its provisions. Other provisions may need to be substantially redrafted, although we believe we agree with the general intent behind them. We have tried to provide detailed comments, addressing our major concerns with these provisions, below. However, due to the length and complexity of the bill, and the very short time that we have had to review and analyze it, these comments are not comprehensive. We anticipate providing further comments to your staff in the coming weeks.

Although we provide our detailed comments below, we have one general comment about the bill that is worth emphasizing up front. ROSA, obviously, would result in a major overhaul of CERCLA. We recognize that the Subcommittee believes fundamentally that the Superfund program is not working—a premise, we note, with which we do not entirely agree—and that the law must be substantially revised. However, we are concerned that many proposed changes in the law are simply change for the sake of change, rather than to correct a specifically articulated problem. Every change in the law will need to be interpreted, first by the implementing agency, and second, in many instances, by the courts. The result, we fear, will be the sifting of limited agency resources from cleanup to writing regulations and guidance; the nullification of fifteen years of judicial precedent; more litigation and transaction costs; a windfall for lawyers; and further delays in cleanup. We strongly urge the Subcommittee to limit changes in the law to those that are truly necessary.

I. REMEDY SELECTION AND COMMUNITY PARTICIPATION (TITLE I)

A. Remedy Selection

Although NAAG has not taken an official position on remedy selection issues, we in New Mexico are very concerned that certain elements of the proposed remedy selection provisions of ROSA, especially when taken together, would result in cleanups that are less than adequate to protect public health and the environment. We strongly urge the Subcommittee to reconsider these proposals.

1. *Cleanup Standards.* ROSA would eliminate, in many cases, the need to actually clean up hazardous substances at a site. Section 102 of ROSA would eliminate the preference for remedial actions that treat hazardous substances to "permanently and significantly reduce the volume, toxicity or mobility of" such substances, as required under current law.[1] Congress added this preference for treatment in the 1986 amendments,[2] recognizing that containment remedies often do not work. As the Commerce Committee noted in 1986, "The problem arises when waste from one Superfund site is merely transferred to another site, where it leaks, creating another, new Superfund site."[3] This lesson, regrettably, seems to have been forgotten. In addition to eliminating the preference for treatment remedies, ROSA would place a new emphasis on remedies consisting of "natural attenuation," "containment," "engineering controls," "institutional controls," "point of use treatment," "and alternative water supply."[4] These provisions would result in remedial actions that are much less protective of public health and the environment, and much more prone to failure.

More specifically, and probably most troubling, ROSA would largely eliminate the need to clean up groundwater. Under the bill, to be protective of human health, a groundwater cleanup must merely "prevent or eliminate any actual human ingestion of drinking water contaminated with hazardous substances" above health-based levels.[5] As noted, the bill allows—and seems to encourage—point of use devices and alternate water supplies for groundwater remediation. Such "band-aid" approaches will virtually always be less costly, and therefore most "cost-effective," than cleanup of the groundwater. Further, to be protective of the environment, a remedy merely must protect the "sustainability of a significant ecosystem."[6] Although an aquifer is part of the environment, it is not an "ecosystem," and generally is not necessary to the sustainability of an ecosystem. Thus, under the ROSA cleanup standards, remediation of contaminated groundwater would not be necessary to protect public health, or to protect the environment, except in unusual circumstances.

2. *Consideration of Costs.* ROSA would require EPA or a delegated state to give primary consideration to "cost-effectiveness' and "cost-reasonableness" in remedy decisions.[7] This emphasis on costs is in stark contrast to current law, which provides that EPA must "first determine the appropriate level of environmental and health

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[1] CERCLA section 121(b), 42 U.S.C. §9621(b).
[2] The Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99–499, 100 Stat. 1613 (October 17, 1986).
[3] H.R. Rep. No. 253(I), 99th Cong., 1st Sess. 58 (1986), *reprinted in* 3 Sen. Com. on Environment and Public Works, A Legislative History of the Superfund Amendments and Reauthorization Act of 1986 at 1821, 101st. Cong., 2d Sess. (1990) (hereinafter "A Legislative History of SARA").
[4] H.R. 2500 §102 (Proposed §121(c) of CERCLA).
[5] H.R. 2500 §102 (proposed §121(b)(2) of CERCLA).
[6] H.R. 2500 §102 (proposed §121(b)(5) of CERCLA).
[7] H.R. 2500 §102 (proposed §121(b) of CERCLA).

protection to be achieved and then select a cost-efficient means of achieving that goal."[8] ROSA would discard this concept of cost-effectiveness.

ROSA would also require EPA or a delegated state to conduct a strict cost-benefit analysis of any proposed remedial action.[9] Because environmental benefits are typically very difficult to quantify—what is clean air and clean water worth?—strict cost-benefit analysis usually under-values environmental benefits. Moreover, the ROSA requirement that costs and benefits be discounted to net present value would further under-value benefits, as short-term costs (discounted only slightly) would be compared to long-term benefits (discounted substantially). For example, while the net present value of groundwater remediation costs is substantial, the net present value of a clean aquifer thirty years hence will almost always be close to zero. Finally, to conduct a cost-benefit analysis as part of each remedial decision would be costly and time-consuming, and would divert EPA or delegated state resources from the more important task of cleanup. While we agree that cost should certainly be considered in remedial decisions, as it is under current law, we do not believe that cost should be the foremost consideration in remedy decisions, nor that strict cost-benefit analysis should be applied to remedy decisions. We therefore strongly urge the Subcommittee to delete these provisions.

3. *Consideration of Injury to Natural Resources.* ROSA would require EPA or a delegated state to consider the potential for injury to, destruction of, or loss of natural resources in selecting a remedial action.[10] We agree with this provision.

4. *Risk Assessment.* ROSA would require EPA or a delegated state to ignore certain substantial health risks in selecting an appropriate remedy. For example, the bill would require risk assessment to apply only to the 90th percentile population distribution.[11] Thus, risks to individuals in the remaining ten percent of the population—children, the sick, and the elderly—would not be considered. Similarly, the bill would provide for consideration only of cancer risks posed by carcinogens,[12] but not for other types of risks caused by chemical exposure, such as neurological, liver, kidney, or other forms of toxicity, mutagenicity, and teratogenicity.

5. *Five-Year Review.* ROSA would eliminate the requirement in section 121(c) for the review of remedial actions at least every five years to ensure that health and the environment are being protected. Elimination of the five-year review is particularly troublesome given the bill's emphasis on remedies consisting of containment and institutional controls, which are much more likely to fail than are treatment remedies.

6. *Technical Impracticability.* ROSA would require EPA and delegated states to make findings of technical impracticability, prior to implementation of the remedy, based on projections.[13] The bill is not clear, however, on what is meant by "technical impracticability." A groundwater remedy, for example, may be technically impracticable to attain drinking water standards, but may nevertheless be practicable to greatly reduce concentrations of contaminants to levels approaching drinking water standards. Under current law, EPA generally makes a finding of technical impracticability only after the remedy has been largely implemented, and contaminants have been reduced to asymptotic levels which are usually much lower than the original concentrations. Under the ROSA provisions, as they might be interpreted, EPA or a delegated state would make an initial finding of technical impracticability and no further cleanup would be required. Moreover, it is often not practicable to determine whether a remedial action will be technically impracticable based on projections or modeling. In sum, we believe this requirement would be most unworkable, and should be deleted from the bill.

7. *Pre-Emption of State Law.* ROSA provides that the cleanup standards set forth in the revised section 121 are the exclusive standards, thus pre-empting state law, including applicable state law. NAAG strongly objects to any pre-emption of state law.

8. *Undefined Terms.* Finally, the remedy selection provisions of ROSA include many key terms that are new, yet undefined. These terms include "realistic and significant risks," "cost-reasonable," "significant ecosystem," and "sustainable functional ecosystem." The term "cost-effective," moreover, is given a meaning manifestly different from its meaning under current law, as explained above.[14] We ques-

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[8] H.R. Cong. Rep. No. 962, 99th Cong., 2d Sess. 245 (1986), *reprinted in* A Legislative History of SARA, *supra* note 3 at 5061.

[9] H.R. 2500 § 102 (proposed § 121(f)(2) of CERCLA).

[10] H.R. 2500 § 102 (proposed § 121(b)(6) of CERCLA).

[11] H.R. 2500 § 102 (proposed § 121(b)(4) of CERCLA).

[12] H.R. 2500 § 102 (proposed § 121(b)(3) of CERCLA).

[13] H.R. 2500 § 102 (proposed § 121(j) of CERCLA).

[14] Although the terms "cost-effective" and "cost-reasonable" are defined in section 401 of ROSA, the definitions expressly apply only "[f]or the purposes of this subsection" 107(f) of

tion whether the use of these new, undefined terms is necessary, and we fear that their interpretation will provide the basis for new rounds of Superfund litigation.

B. Community Participation

We generally support efforts to increase public participation in the Superfund process. We nevertheless find it problematic and inappropriate to include responsible parties on community assistance groups, as provided in section 104 of ROSA.[15] We have no other comments on the public participation provisions of ROSA at this time.

C. Judicial Review

Section 114 of ROSA would eliminate the prohibition on pre-enforcement review in section 113(h) of CERCLA. NAAG is strongly opposed to this provision. It would allow responsible parties and other persons to challenge the implementation of a remedial action once the record of decision (ROD) has been signed, thus potentially delaying cleanup for years. We strongly urge the Subcommittee to preserve the prohibition on pre-enforcement review.

D. Transition

Section 115 of ROSA would require EPA to reopen final remedy decisions made prior to the bill's enactment, and to re-examine such decisions applying the bill's new remedy selection standards. The bill would require EPA to reopen decisions for sites for which the Record of Decision ("ROD") has been signed; and sites for which the remedial design has been completed; and even, under certain circumstances, sites for which the construction has been completed and operation and maintenance is underway. This requirement is extremely problematic for a number of reasons. First, the requirement would divert EPA resources to reviewing remedial decisions at a great many sites for which a ROD has been signed but the remedy is not yet complete. Second, the requirement would delay cleanup at many of these sites. In New Mexico, for example, which has thirteen National Priorities List ("NPL") sites, cleanup for at least three of those sites would likely be delayed by this requirement. Finally, because the EPA determination whether to reopen a remedial decision is subject to very limited agency discretion, and is subject to judicial review, the requirement would likely result in new rounds of litigation, compounding transaction costs, and further delays in cleanup.

It is significant to note that the Superfund Amendments and Reauthorization Act of 1986 ("SARA")[16], which then established new and more stringent cleanup standards, applied those new standards only to ROD's signed after the date those amendments were enacted. Section 121(b) of SARA expressly provided that the new cleanup standards of section 121, added by SARA, did not apply to any ROD signed before the date of enactment. It further provided that such standards applied only "to the maximum extent practicable" to ROD's signed during the thirty-day period immediately following enactment.[17]

We strongly oppose section 115 of ROSA, and recommend that it be deleted in favor of a provision similar to that in section 121(b) of SARA.

I. LIABILITY

A. "Retroactive" Liability

NAAG strongly supports retention of so-called retroactive liability, as we have repeatedly stated.[18] We commend the Subcommittee for largely retaining retroactive liability in the ROSA bill, despite the political pressure to eliminate such liability. we are nevertheless troubled by the bill's requirements for reimbursement of 50% of any cleanup costs incurred after enactment, but allocable to pre-1987 disposal activities.[19] This provision would shift a large portion of the cleanup from the party responsible for the pollution to the taxpaying public, and would place additional de-

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CERCLA, which addresses natural resource damages. The definitions, moreover, provide little guidance on the meaning of these terms.

[15] H.R. 2500 § 104 (proposed § 117(g)(4)(I) of CERCLA.

[16] Pub. L. No. 99–499, 99th Cong., 1st Sess., 100 Stat. 1613 (Oct. 17, 1986).

[17] Pub. L. 99-499, 100 Stat. 1613, 1678 (Oct. 17, 1986) (section 121(b) of SARA was not codified in CERCLA). See also H.R. Conf. Rep. No. 962, 99th Cong., 2d Sess. 184 (1986), *reprinted in* 6 A Legislative History of SARA, *supra* note at 5000.

[18] E.g., Letter from New Mexico Attorney General Tom Udall, Washington Attorney General Christine O. Gregoire, and New Jersey Attorney General Deborah T. Paritz to Rep. Michael G. Oxley, at 1-2 (Aug. 11, 1995), letter from New Jersey Attorney General Deborah T. Poritz to Senator Robert C. Smith, signed by 43 attorneys general, at 2 (April 27, 1995).

[19] H.R. 2500 § 201 (proposed § 112(g) of CERCLA).

mands on the Superfund. We question whether adequate funding is available to cover the reimbursement requirements.

B. Limitation on Liability for Certain Parties

We generally support various limitations on liability—commonly referred to as "carve-outs"—for certain classes of parties, such as *de minimis* and *de micromis* parties, generators of municipal solid waste, lenders, innocent landowners, and prospective purchasers. Such provisions must be very carefully drafted, however. Although we agree conceptually with many—though not all—of the limitations on liability contained in ROSA, we believe that these provisions will need some revision.

1. *De Minimis Parties.* We generally support revisions that would make it easier for EPA or a delegated state to enter into *de minimis* settlements, as section 214 of ROSA is intended to do.[20] We believe, however, that the determination of *de minimis* criteria should be left largely to the discretion of EPA or the delegated state on a site-by-site basis. We are therefore troubled by the ROSA provisions specifying that a party contributing no more than 1% of the total volume of waste sent to a site is, or is presumed to be, *de minimis*.[21] At many sites a volumetric level substantially greater than, or less than, 1% may be appropriate to qualify as *de minimis*, or other factors such as toxicity and mobility may need to be considered. At some sites, all of the parties may have contributed less than 1%. We question, moreover, whether it is appropriate to treat as *de minimis* a party with limited ability to pay response costs.[22] While ability to pay is certainly a factor to be considered in settlement, as EPA does, inability to pay should not qualify a party as *de minimis*. Finally, we are also troubled by the exemption from liability for *de minimis* parties for pre-1987 disposal.[23]

2. *De Micromis Parties.* We support an exemption from liability for so-called *de micromis* parties, although defining the criteria for such an exemption is quite difficult. Section 203(a) of ROSA would create an exemption for *de micromis* parties that sent no more than 110 gallons of liquid material or 200 pounds of solid material to a site.[24] We believe that the ROSA criteria for the *de micromis* exemption are much too broad. A volume of 100 gallons (two fifty-five gallon drums) is a very substantial volume of liquid hazardous waste. Indeed, at many smaller sites this volume would be greater than the bill's presumed *de minimis* level of 1%. Moreover, the specified volumes of liquid and solid materials are not consistent. Based on the density of water (which is reasonably close to the density of most liquid hazardous waste streams), the *de micromis* level would be 880 pounds of liquid waste or 200 pounds of solid waste, notwithstanding that liquid hazardous waste is usually more mobil and more bioavailable. Again, we believe the determination of *de micromis* criteria should best be left to the discretion of EPA or the delegated state, perhaps by regulation.[25] If the term is defined in the statute, it should be based on lower volumes that are more consistent.

3. *Municipal Solid Waste.* We agree with the concept of limiting liability for the disposal of municipal solid waste. Section 203 of ROSA includes several provisions limiting such liability. First, it would exempt residential property owners, small business, and small non-profit organizations from liability as generators or transporters of municipal solid waste.[26] Second, it would limit the liability of other generators and transporters of municipal solid waste to 10% of the total response costs.[27] Third, it would create a broad exemption from liability for a landfill listed on the NPL that accepted, pursuant to state or local authorization, any household waste.[28]

We are particularly troubled by the third limitation, exempting from liability parties otherwise responsible for sites at which some household waste was disposed. We believe this exemption is too broad. A great many industrial waste and hazardous waste landfills accepted some quantities of municipal solid waste. The parties responsible for the disposal of industrial and hazardous wastes at these landfills should not receive a blanket exemption from CERCLA liability simply because some municipal solid waste was also disposed of at the landfill. Such an exemption would

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[20] H.R. 2500 § 214 (proposed revisions to § 122(g) of CERCLA).
[21] H.R. 2500 § 203(a) (proposed § 107(n)(1)(B) of CERCLA; § 214 (proposed section 122(g)(1)(A)(i) of CERCLA).
[22] H.R. 2500 § 214 (proposed section 122(g)(1)(D) of CERCLA).
[23] H.R. 2500 § 203(a) (proposed § 107(n)(1) of CERCLA).
[24] H.R. 2500 § (a) (proposed § 107(n)(4) of CERCLA).
[25] See Environmental Protection Agency, Guidance on CERCLA Settlements With De Micromis Waste Contributors (July 30, 1993) (OSWER Directive No. 9834.17).
[26] H.R. 2500 § 203(a) (proposed § 107(n)(3) of CERCLA).
[27] H.R. 2500 § 203(a) (proposed § 107(n)(7) of CERCLA).
[28] H.R. 2500 § 203(a) (proposed § 107(n)(2) of CERCLA).

inappropriately shift the cost of cleaning up these landfills from the responsible parties to the taxpaying public.

4. *Recyclers.* Section 215 of ROSA creates a broad new exemption for "recycling" activities.[29] It would limit generator and transporter liability for transactions involving the recycling of scrap paper, glass, textiles, rubber, metal, and batteries, including spent lead-acid batteries. We are very troubled by this exemption, as we were by a very similar exemption in the Senate bill last year.[30]

First, the exemption is mischaracterized as a "clarification,"[31] although it would represent a major substantive change of current law. The bill also provides that the exemptions do not affect any pending judicial action. If these exemptions are interpreted as a clarification of existing law, however, any such pending actions would likely be dismissed.

More fundamentally, we believe the exemption is inappropriate, particularly as it applies to spend lead-acid batteries. Such batteries contain large quantities of lead, an especially toxic substance, as well as smaller quantities of cadmium and other heavy metals. Much of the lead in these batteries is in the form of lead oxide and lead sulfate, compounds that are relatively mobile and bioavailable in the environment. Moreover, the sulfuric acid in these batteries (which has a pH approaching 0) greatly enhances the solubility and mobility of these metals. Furthermore, the battery reclaiming industry has a woefully poor record for compliance with environmental laws.[32] The industry has created a large number of Superfund sites.

The bill would place certain limitations on the exemption for spent batteries. For several reasons, however, the limitations may not work as intended. First, the bill provides that the exemption for spent lead-acid batteries would only apply if the person was in compliance with "applicable Federal regulations" governing the management of such batteries.[33] EPA has promulgated regulations under RCRA governing the management of spent lead-acid batteries.[34] In states with RCRA authorization, however, the state regulations, not the federal regulations, would be applicable. Hence, in most states, there are no "applicable federal regulations." Second, the secondary lead smelter industry has repeatedly argued that the RCRA regulations—under either federal or state authority—do not apply to spent batteries. These batteries, the industry argues, are raw material; they are not discarded, and thus not solid wastes and not subject to regulation under RCRA.[35] Finally, the lead components of spent lead-acid batteries would also fall within the definition of "scrap metal." The limitations on the exemption for scrap metal is significantly less stringent than the limitations on the exemption for spent batteries. As the exemptions are currently drafted, a person recycling the lead from spent lead-acid batteries could take advantage of the less stringent limitation from scrap metal.

We urge the Subcommittee to delete the recycling exemption from the bill, most particularly as it applies to spent lead-acid batteries. If the exemption is not deleted, it should be revised to address the issues we have raised.

C. Allocation

NAAG does not have an official position on the issue of allocation, as there is a wide range of views on the issue among the attorneys general. During the Superfund debate last year, the New Mexico Attorney General expressed serious reservations about the allocation provisions in S. 1834.[36] Our primary concern was and continues to be that the allocation procedure will be costly and time-consuming to EPA or a delegated state, and will inevitably result in delays in cleanup.

Our concerns are greatly magnified by the allocation provisions of ROSA, which provide a moratorium on enforcement until at least three months after completion of the allocator's report. These provisions represent a complete reversal of current law. When Congress passed CERCLA in 1980, and reauthorized the statute in 1986, it placed primary importance on achieving site cleanup, leaving allocation to be re-

[29] H.R. 2500 § 215 (proposed § 129 of CERCLA).
[30] S. 1834 § 410, 103d Cong., 2d Sess. (1994).
[31] H.R. 2500 § 215 (Proposed § 129(a) of CERCLA).
[32] See, *e.g., United States* v. *ILCO*, 32 Ent't Rep. Cas. (HWA) 1977 (N.D. Ala. 1990) (imposing a civil penalty of $3.5 million on ILCO, a secondary lead smelter in Leeds, Alabama, and its president, Diego Maffei, for violations of RCRA and the Clean Water Act).
[33] H.R. 2500 § 215 (proposed § 129(a)(H)(i) of CERCLA).
[34] 40 C.F.R. Part 266, Subpart G.
[35] See *e.g., United States* v. *ILCO, Inc.*, 996 F.2d 1126 (11th Cir. 1993) (rejecting defendants' arguments that the lead components reclaimed from spent lead-acid batteries are "raw materials" not subject to regulation under RCRA).
[36] Superfund Reform Act of 1994: Hearings on S. 1834 before the Subcomm. on Superfund, Recycling, and Solid Waste Management of the Sen. Comm. on Environment & Public Works, 103d Cong., 2d Sess. at 403-05 (April 12, 1994) (statement of New Mexico Attorney General Tom Udall).

solved later in contribution actions.[37] By contrast, the ROSA approach is to allocate first, cleanup later.

We are very concerned that the allocation process will be a lengthy one that will further delay site cleanup. Section 207 of ROSA provides a lengthy allocation procedure that would be required at all sites involving two or more parties.[38] First, EPA or the delegated state would conduct a potentially responsible party search.[39] Within 120 days after commencement of the search, EPA or the delegated state would be required to prepare an initial list of responsible parties.[40] Within 120 days of the initial list, EPA or the delegated state would prepare a final list.[41] Within 180 days of the final list, the allocator would prepare a written report, although this deadline could be extended for an additional 90 days for good cause.[42] EPA or a delegated state could not bring an enforcement action until at least 90 days after issuance of the allocator's written report.[43]

According to the schedule set forth in the bill, this allocation procedure, including the enforcement moratorium, would take from seventeen to twenty months to complete. In practice, the procedure is likely to take considerably longer. This schedule stands in stark contrast to the 120 day moratorium period for reaching settlement under current law, which is discretionary with EPA.[44] The consequence of this procedure, we fear, will be substantial further delay in starting Superfund remedial actions.

We are also very concerned that implementation of the allocation procedure would place a significant burden on EPA and delegated state agencies. Implementation is likely to entail considerable agency resources, at the expense of the more important goal of getting sites cleaned up.

Finally, we question whether the allocation provision is even necessary. As previously discussed, ROSA contains several provisions designed to limit the liability of *de minimis* and other small parties that tend to bear a disproportionate share of transaction costs. These provisions would resolve or eliminate the liability of a great many small-stake parties, particularly at large multi-party sites, and would thereby substantially reduce the burden and costs of allocation. Thus, the benefits of the bill's allocation provision, when taken in conjunction with the other provisions of the bill, are of considerably less consequence.

III. BROWNFIELDS AND VOLUNTARY CLEANUP (TITLE III)

We support the concept of encouraging the use and development of abandoned industrial sites, or so-called "brownfields." We also support the the concept of encouraging voluntary cleanup. We have no comments at this time on these provisions of ROSA.

IV. NATURAL RESOURCE DAMAGES (TITLE IV)

As introduced, the natural resource damages title of ROSA represents a substantial improvement over earlier discussion drafts. We very much appreciate that the Subcommittee has listened to our comments and addressed many of our concerns. However, we still have major concerns with these provisions of the bill, which would cripple most state programs. We note with some consternation that every one of the many changes that ROSA would make to the natural resource damage provisions of CERCLA are designed to limit natural resource damage liability, or to limit natural resource trustee authority.

A. Limitations on Natural Resources

Scattered throughout the natural resource damages title of ROSA are provisions that limit the scope of natural resources covered by the statute. These provisions would eliminate many state, tribal, and federal claims for injured natural resources.

1. *Measurable and Ecologically Significant Resources.* First, section 401(a) of ROSA would amend the CERCLA liability provisions by limiting liability for natural

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[37] See *United States* v. *South Carolina Recycling and Disposal, Inc.*, 653 F. Supp. 984, 995 (D.S.C. 1984), *aff'd sub nom. United States* v. *Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989) (apportioning the costs of cleanup is a matter "more appropriately considered in an action for contribution between responsible parties after plaintiff has been made whole.").

[38] H.R. 2500 § 207 (proposed § 128 of CERCLA).

[39] H.R. 2500 § 207 (proposed § 128(c)(1) of CERCLA).

[40] H.R. 2500 § 207 (proposed § 128(c)(2) of CERCLA).

[41] H.R. 2500 § 207 (proposed § 128(f) of CERCLA).

[42] H.R. 2500 § 207 (proposed § 128(i)(5) of CERCLA).

[43] H.R. 2500 § 207 (proposed § 128(b)(4) of CERCLA).

[44] Section 122(e) of CERCLA, 42 U.S.C § 9622(e).

resource damages to resources that are "measurable and ecologically significant."[45] It is not clear what this new language means, however, nor why it is necessary. Courts will strain to provide some meaning to this new language, and responsible parties will no doubt devise clever and novel arguments to limit their liability based on this vague language. For example, a colorable argument can be made that most aquifers are not "ecologically significant" because they do not support a significant ecosystem.

2. *Public Resources.* Second, several provisions of ROSA specify that only injuries to "public" resources, or "public use" of resources, or "services to the public" are recoverable.[46] However, many resources are not available to the general public in the sense that, say, a national park is. Rather, they may be available only a small segment of the or in some instances to only a few individuals. Examples include wildlife resources that might be available to only a limited number of licensed hunters, or groundwater resources that might provide drinking water to only a few nearby residents. By limiting covered resources to "public" resources, the bill may preclude recovery for injured resources that benefit many individuals but not the general public. We urge the Subcommittee to delete the repeated references to "public" resources.

3. *Resources "Managed By" a Federal Trustee.* Third, section 401(c) eliminates coverage for resources "managed by" the federal government.[47] This revision would preclude federal trustees from recovering for injuries to resources, such as fish and wildlife, that are managed but not owned by federal trustees.

4. *Resources Subject to a "Committed Use."* Fourth, section 401(c) would limit recovery for lost use values to "committed uses" of the natural resources.[48] While the term "committed use" is not defined or explained in the bill, the term would presumably be given the same meaning as in the natural resource damage assessment regulations promulgated by the Department of the Interior ("DOI"). These regulations define "committed use" very narrowly as either "a current public use; or a planned public use of a natural resource for which there is a documented legal, administrative, budgetary, or financial commitment established before the discharge or release of a hazardous substance is detected."[49]

We find this restriction problematic, and have submitted comments to DOI, as part of the biennial review process, asking that the "committed use" limitation be deleted from the regulations. While the purpose of this limitation in the regulations is apparently to prevent claims for losses of "purely speculative" uses of the resource,[50] the effect will be to prevent claims for losses of uses that are very real. Consider the following not unlikely scenario: A release of a hazardous substance contaminates a groundwater aquifer that is a potential source of drinking water, although there is no documented plan to use it as such at the time the release is detected. Subsequently, the surrounding area is developed and a source of potable water is urgently needed. Environmental agencies begin clean-up (restoration) of the aquifer, but it is expected to be a matter of decades before drinking water standards are attained. The natural resources trustee, and the public, has clearly suffered a tangible and quantifiable loss in the value of the services of that aquifer until the cleanup is complete. No claim can be brought, however, because there was no documented plan to use the aquifer as a source of drinking water at the time the release was detected. Such a scenario is especially likely in a state like New Mexico, which is developing rapidly with increasing demands placed on its scarce groundwater resources. We therefore urge the Subcommittee, as we have urged DOI, to delete the "committed use" requirement.

B. Cap on Liability

Section 401(b) of ROSA would substantially revise the $50 million cap on natural resource damage liability.[51] Under section 104(c)(1) of CERCLA, as currently written, the $50 million cap applies to each responsible person "for each release of a hazardous substance or incident involving a release." By contrast, under section 401(b) of ROSA, the $50 million cap would apply in "aggregate" to "all responsible parties" for "cumulative releases from all facilities" within either 'any area of contamination" listed on the NPL, or "the entire contiguous area of contamination" at

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[45] H.R. 2500 § 401(a) (proposed revision to § 107(a)(4)(C) of CERCLA).
[46] H.R. 2500 § 401(c) (proposed revisions to § 107(f)(1)(A), (f)(1)(C), (f)(1)(D), (f)(3)(A), and (f)(3)(B) of CERCLA.
[47] H.R. 2500 § 401(c) (proposed revision to § 107(f)(2)(A)(i) of CERCLA).
[48] H.R. 2500 § 401(c) (proposed revision to § 107(f)(3)(B) of CERCLA.
[49] 43 C.F.R. § 11.14(b) (emphasis added).
[50] Sec. 43 C.F.R. § 11.84(b)(2).
[51] H.R. 2500 § 401(b) (proposed § 107(c)(4) of CERCLA).

non-NPL sites. Although the proposed revised language is quite vague, it would appear to reduce potential damage recoveries in at least two ways.

First, the revised cap would apply collectively to all the responsible parties, rather than individually to each responsible party. This result is puzzling, given the original purpose of the cap to address insurability issues.[52] It would make little sense to apply the cap collectively to all the responsible persons for a given site or facility, when those persons are individually insured by different insurers.

Second, the revised cap would apply on a per site basis, rather than per release or per incident basis. Because multiple releases or multiple incidents can and often do occur at the same site, this revision would also reduce the damages that trustees are entitled to recover.

While this proposal would impact a relatively small number of sites, such as the Clark Fork site in Montana, the Los Angeles and Long Beach Harbor (Montrose) site in California, and the Coeur d'Alene site in Idaho, the impact on these sites would be tremendous. Numerous parties have conducted several different activities at these sites over a period of many years, causing multiple releases or incidents involving releases. Consequently, the total damages for injured natural resources significantly exceeds $50 million. The ROSA provisions would shift the excess costs of restoring or replacing those injured resources to the public, or, more likely, leave these injured resources largely unrestored in perpetuity. We continue to oppose any such revision to the $50 million cap, as we have in the past.[53]

Furthermore, section 401(b) of ROSA would, inexplicably, eliminate the exception to the cap for "willful negligence."[54] Section 107(c)(2) of CERCLA provides that the cap does not apply where the release of a hazardous substance was the result of "willful misconduct," "willful negligence," or the violation of applicable regulations. The bill would delete the exception for rovision, and we oppose it.

C. Damage Assessments.

1. *Regulations.* Section 401(c) of ROSA requires trustees to follow the natural resource damage assessment regulations that DOI has promulgated.[55] Adherence to these regulations is optional under current law, and they were written to be optional. Strict adherence to these complex regulations will often result in lengthier, more complex assessments and significantly higher assessment costs, ultimately to be borne by the responsible parties. As an exception, the bill would allow a trustee to use other methods for assessing damages, but only if the trustee meets the substantial burden of establishing that the alternate assessment method would result in a more cost-effective plan for restoring the injured resources. Thus, alternate methods can be used only if they result in lower restoration costs, regardless whether they result in lower assessment costs.

Moreover, the bill fails to provide for any transition until new regulations are promulgated. ROSA would require numerous revisions to the existing DOI regulations, simply to comply with the bill's new damage assessment requirements. Until such revisions to the regulations are made, strict adherence to the regulations would be contrary to the requirements of ROSA. At the same time, ROSA would mandate adherence to the regulations. The trustees would be caught in a catch-22.

We urge the Subcommittee to drop this requirement from the bill, first because it would result in higher assessment costs, second because it would place an unseemly burden on trustees, and third because it would be impossible to follow until revised regulations are premulgated.

2. *Rebuttable Presumption.* ROSA would eliminate section 107(f)(2)(C) of CERCLA, which provides that a damage assessment conducted in accordance with the regulations is entitled to a rebuttable presumption on behalf of the trustee. We urge the Subcommittee to leave this provision of current law intact.

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[52] The cap was added as an amendment to S. 148C, the Senate bill which eventually became CERCLA. In submitting this proposed amendment, Sen. Howard Cannon, the sponsor of the amendment, provided the following explanation: "This amendment establishes monetary limitations on liability for persons who are liable for releases of hazardous substances under the provisions of this bill. Concern has been expressed that without such liability limitations, it would be difficult, if not impossible, for potentially liable persons to obtain insurance to cover their operations." 126 Cong. Rec. 27085 (Sept. 24, 1980) (statement of Sen. Cannon), *reprinted in*, 3 Sen. Comm. on Environment and Public Works. A Legislative History of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund) at 184, 97th Cong., 2d Sess. (1983).

[53] E.g., letter from Deborah T. Paritz, Attorney General of New Jersey, to Senator Robert C. Smith, signed by 35 attorneys general (May 11, 1995); Hearing before the Subcomm. on Commerce, Trade and Hazardous Materials of the House Comm. on Commerce, 104th Cong., 2d Sess. (June 20, 1995) (statement of New Mexico Attorney General Tom Udall at 29).

[54] H.R. 2500 § 401(b) (proposed § 107(c)(2) of CERCLA).

[55] H.R. 2500 § 401(b) (proposed § 107(c)(4) of CERCLA).

3. *Lead Trustee.* We are generally in accord with the requirement for a "lead trustee,"[56] although we have some minor comments on the provision.

First, in working with other trustee agencies, we have generally avoided naming a "lead" trustee, but have instead proceeded as "co-lead." This approach has worked well in our experience, and it avoids the counterproductive disputes over "turf" which too often seem to interfere with inter-agency cooperation. We suggest that the bill be revised to expressly allow for "co-lead trustees."

Second, we have serious concern over designation as lead trustee of an agency that is also a responsible party. In our experience, federal trustee agencies have been much, much less cooperative where the trustee agency is a responsible party. The dual identity of natural resource trustee and responsible party, which afflicts many agencies, both federal and state, at many sites, is a recurring problem. We suggest that the bill be revised to prohibit the designation as the lead trustee of a federal or state agency that is a responsible party.

D. Restoration

1. *Consideration of Costs.* Section 401(c) of ROSA provides that a restoration plan must be "reasonable," meaning "cost-effective" and "cost-reasonable."[57] Although ROSA defines these terms for the purposes of subsection 107(f), the definitions provide little guidance to elucidate the meaning of the terms. Section 401(c) also requires trustees to conduct a cost-benefit analysis of various restoration alternatives. We are troubled by these requirements for much the same reasons described in our discussion of the remedy selection procedures above.

2. *Natural Recovery.* Section 401(c) of ROSA also requires trustees to consider natural recovery of injured resources and natural attenuation.[58] We are concerned that this requirement, when coupled with the requirement that the most "cost-effective" and "cost-reasonable" restoration plan be selected, may cause natural attenuation to be the prescribed restoration at most sites.

3. *Regional Restoration.* ROSA does not address the issue of regional restoration plans, although we have repeatedly proposed clarification of the statutory authority to conduct regional restoration.[59]

E. Recovery of Damages

1. *Non-Use Values.* Section 401(c) of ROSA expressly prohibits the recovery of damages for non-use values.[60] NAAG is opposed to any limitation on recovery for non-use values, as we have stated previously.

Non-use value is widely recognized by economists as a real value. While the methodology for determining non-use value—contingent valuation ("CV")—is quite controversial, the methodology is evolving and improving. It can be a useful tool in the effort to place a value on resources that are not traded in the market place, and on the environmental benefits of those resources. We do not believe Congress should stifle the development of this methodology by legislation.

Moreover, for a CV study to be of any value in supporting a natural resource damage claim, it must meet the evidentiary standards for admissibility of scientific evidence in a federal court. The Supreme Court has recently spoken on this issue, holding that scientific evidence can be admitted only if the trial court finds that it is both relevant and reliable.[61] A trial court must determine the reliability of scientific evidence by considering several factors: (1) whether the scientific methodology has been tested; (2) whether the methodology has been subjected to peer review and publication; (3) the rate of error of the methodology; and (4) the general acceptance of the methodology in the relevant scientific community.[62] Thus, the courts, would be required to pass on the reliability of any CV study, thereby providing a substantial check on the use of CV to support damage claims.

2. *Double Recovery.* Section 401(c) of ROSA would revise, and presumably expand, the prohibition on double recovery for natural resource damages.[63] The revised language is very unclear, however. It is also unclear why this revision is necessary, as section 107(f)(1) of CERCLA already includes a prohibition on double recovery. We

[56] H.R. 2500 § 401(c) (proposed § 107(f)(4) of CERCLA).
[57] H.R. 2500 § 401(c) (proposed § 107(f)(1) of CERCLA).
[58] H.R. 2500 § 401(c) (proposed § 107(f)(5) of CERCLA).
[59] Hearing before the Subcomm. on Commerce, Trade and Hazardous Materials of the House Comm. on Commerce, 104th Cong., 2d Sess. (June 20, 1995) (statement of New Mexico Attorney General Tom Udall at 25-26).
[60] H.R. 2500 § 401(c) (proposed § 107(f)(3)(C) of CERCLA).
[61] *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 13 S.Ct. 2786, 2795 (1993).
[62] *Id.* at 2796-57.
[63] H.R. 2500 § 401(c) (proposed § 107(f)(3)(D) of CERCLA).

fear that the revised language may be interpreted to preclude recovery for any damages at sites that are undergoing remediation.

3. *Irreversible and Irretrievable Commitment.* Section 410(c) of ROSA would also expand the "irreversible and irretrievable commitment" defense to include such commitments made in a final ROD.[64] Section 107(f)91) of CERCLA currently provides that there shall be no recovery for injured resources where such resources were "specifically identified as an irreversible and irretrievable commitment of natural resources in an environmental impact statement." Under ROSA, there would be no recovery where the resources were so identified in a ROD. Thus, at many NPL sites, where the ROD expressly recognizes that certain injured natural resources will not be addressed as part of the remediation, trustees may be prohibited from recovering damages for those injured resources.

F. Statute of Limitations

ROSA does not propose to correct the statute of limitations for natural resource damages, a correction that we have long advocated.[65] The current statute is very problematic for several reasons, as we have stated. We continue to recommend that CERCLA be amended to provide that a claim for natural resource damages must be brought within three years of the date that the damage assessment is completed, as under section 1017(f)(1) of the Oil Pollution Act.

G. Judicial Review

Similarly, ROSA does not propose to address the scope and standard of judicial review of trustee decisions, also a revision that we have advocated.[65] We continue to recommend that CERCLA be amended to expressly require that judicial review of trustee decisions be limited to the administrative record, and that trustee decisions be upheld unless found to be arbitrary and capricious or otherwise not in accordance with law. Such a requirement would reduce the amount litigation associated with natural resource damage claims and would allow a much more open decision-making process.

V. STATE ROLES (TITLE V)

NAAG strongly favors the delegation of Superfund authorities to qualified states, as we have stated many times. ROSA would provide for such delegation, and we strongly support that aspect of the bill. However, we are very concerned about some of the details of the state roles title.

A. Pre-Emption of State Law

We are particularly concerned about the bill's pre-emption of state law. Section 501(a) of ROSA would require delegated states to select remedial actions pursuant to the federal cleanup standards under section 121, and to determine liability pursuant to the federal liability standards under section 107.[67]

This provision is particularly troublesome for those states that are most likely to qualify for delegation because of their demonstrated success in implementing their own cleanup programs. These state cleanup programs have succeeded based upon remedy selection and liability provisions chosen by the states to meet the needs and desires of their citizens for adequate protection of health, safety and the environment—areas in which states have traditionally exercised significant authority. These programs are fully capable, as currently implemented, to take over cleanup of NPL sites. Requiring states with highly successful cleanup programs to change their liability and cleanup standards to fit the federal mold is both unnecessary and wasteful.

B. Delegation Process

Section 501(a) of ROSA provides for a relatively simple, streamlined delegation process, which we support. We have only minor comments on these provisions.[68]

First, a state having corrective action authorization under RCRA must meet only very minimal requirements to obtain Superfund delegation. Unlike other states, a state with corrective action authorization need not demonstrate that it has adequate "financial and personnel resources, organization, and expertise" to administer the program. Although NAAG has not taken a position on this particular issue, we in

[64] H.R. 2500 § 401(c) (proposed § 107(f)(3)(E) of CERCLA).

[65] E.g., Hearing before the Subcomm. on Commerce, Trade and Hazardous Materials of the House Comm. on Commerce, 104th Cong., 2d Sess. (June 20, 1995) (statement of New Mexico Attorney General Tom Udall at 16-19).

[66] *Id.* at 20-22.

[67] H.R. 2500 § 501(a) (proposed § 131(b)(1) of CERCLA).

[68] H.R. 2500 § 501(a) (proposed § 131(a)(2) of CERCLA).

New Mexico question the appropriateness of this approach. Only demonstrably qualified states should be entitled to receive delegation of CERCLA authority. The fact that a state has corrective action authority under RCRA does not necessarily ensure that it has the financial and personnel resources and other qualifications necessary to implement the Superfund program. While authorization and successful implementation of a RCRA corrective action program should certainly be a consideration relevant to EPA's determination, EPA should make an independent determination on each states' application.

Second, a state seeking delegation for nuclear facilities should not be required to show special expertise in radionuclides, as section 501(a) of ROSA would require.[69]

C. Cost Share

Section 501(b) of ROSA would require a state to pay 10% of the costs of a remedial action, including operation and maintenance, at any NPL site located in that state.[70] This requirement is much preferable to current law, which requires a state to pay 10% of the costs of a remedial action plus 100% of the costs of operation and maintenance. We support this aspect of the bill.

D. National Priorities List

Section 502(a) of ROSA would place a cap on new NPL listings. A total of 125 sites could be added to the NPL over the next seven years, with no further listings after that.[71]

We are troubled by the proposed cap on NOL listing, and by the proposed termination of the NPL after seven years. Sites should be listed on the NPL on the basis of the risk they present to human health and environment, not on the basis of an arbitrary numerical limit. Similarly, sites should be added to the NPL for so long as sites continue to pose a serious enough threat to health and the environment as to warrant remedial action.

The cap on NPL listing might remove a major incentive for responsible parties to conduct voluntary cleanups. In New Mexico, as in other states, we have several sites for which NPL listing has been deferred pending negotiation of a voluntary cleanup agreement. The responsible parties for these sites, recognizing their potential CERCLA liability, have entered into negotiations to reach such agreements. If NPL listing is capped, these parties will realize that CERCLA liability may never be imposed, and much of their incentive to conduct voluntary cleanups will be lost.

VI. FEDERAL FACILITIES (TITLE VI)

NAAG has long-supported full delegation of Superfund authority over federal facility sites.[72] We are generally very pleased with the federal facility title of ROSA, and we strongly commend the Subcommittee for its efforts. We have a few minor comments on the details of this title, which we will provide to Subcommittee staff at a later date.

A. Delegation Procedures.

Section 601 of ROSA would provide for the transfer of Superfund authority for federal facilities to delegated states.[73] We support the state delegation procedures, which are very similar to the provisions we proposed last year.

B. Waiver of Sovereign Immunity

Section 605 of ROSA would more clearly waive the federal government's sovereign immunity from enforcement actions under CERCLA, using language similar to that in the Federal Facility Compliance Act of 1992.[74] NAAG has long advocated a clear waiver of federal sovereign immunity,[75] and we strongly support this provision.

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[69] H.R. 2500 § 501(a) (proposed § 131(a)(2)(i)(V) and (ii)(IV) of CERCLA).

[70] H.R. 2500 § 501(b)(1) (proposed § 104(c)(3)(A) of CERCLA).

[71] H.R. 2500 § 502(a) (proposed § 105(b) of CERCLA).

[72] E.g., Letter from New Mexico Attorney General Tom Udall, Washington Attorney General Christine O. Gregoire, and new Jersey Attorney General Deborah T. Poritx to Rep. Michael G. Oxley, at 3-4 (Aug. 11, 1995); letter from New Jersey Attorney General Deborah T. Poritz to Senator Robert C. Smith, signed by 43 attorneys general, at 3 (April 27, 1995).

[73] H.R. 2500 § 601 (proposed § 120(g) of CERCLA).

[74] H.R. 2500 § 605 (Proposed revision to § 120(a)91) of CERCLA).

[75] E.g., Superfund Reform Act of 1994: Hearings on S. 1834 before the Subcomm. on Superfund, Recycling, and Solid Waste Management of the Sen. Comm. on Environment & Public Works, 103d Cong., 2d Sess. at 405-06 (April 12, 1994) (statement of New Mexico Attorney General Tom Udall).

VII. MISCELLANEOUS (TITLE VII)

Section 701 of ROSA contains a number of new definitions and revisions to existing definitions, most of which we agree with. We would like to highlight a few of these definitional amendments.

First, section 701(6) would revise the CERCLA definition of "response" to clarify that response costs include attorney's fees and oversight costs incurred by the President, a state, or an Indian tribe.[76] NAAG has long advocated such a clarification. We suggest that indirect costs also be included in this revised definition.

Second, section 701(9) would add a new definition of "municipal solid waste."[77] Overall, the definition is very well crafted, but it may need some minor revisions.

Third, section 701(9) would add a new definition of "naturally occurring radioactive materials,"[78] which would be excluded from the revised definition of "hazardous substance."[79] This definition is quite vague and needs to be clarified.

VIII. AMENDMENTS TO THE OIL POLLUTION ACT OF 1990 (TITLE VIII)

We are generally very troubled by ROSA's proposed amendments to the Oil Pollution Act ("OPA"). This title would amend the natural resource damage provisions of OPA in many of the same respects that title IV would amend the natural resource damage provisions of CERCLA. The proposed amendments would require restoration to be "cost-effective" and "cost-reasonable"; they would require trustees to consider natural recovery as a restoration alternative, they would limit application of the law to "measurable and ecologically significant" resources and "public" resources; they would preclude recovery with non-use values; and they would mandate compliance with the regulations. We oppose all of these amendments for the reasons stated in the discussion of title IV above.

IX. REMEDIATION WASTE MANAGEMENT (TITLE IX)

Title IX of ROSA would set standards for the regulation of wastes from Superfund remediation activities. Section 901 would exempt such remediation wastes from, among other things, the RCRA land disposal restrictions, and the RCRA minimum technology requirements.[80] While we agree that remediation wastes should not be subject to the land disposal restrictions, at least when managed on-site, we believe that such wastes should be disposed of in hazardous waste landfills and other land disposal units meeting the minimum technology requirements.

X. FUNDING (TITLE X)

We have little to say on the funding title at this time. We strongly support the provisions making Superfund monies available for natural resource damage assessments.

CONCLUSION

On behalf of NAAG, I want to thank you again for the opportunity to testify today on this important issue. We look forward to working with you and your staff in revising ROSA to address these and other issues.

That concludes my prepared statement. I'll be happy to take any questions you may have.

Mr. OXLEY. Mr. McKnight.

STATEMENT OF KEVIN McKNIGHT

Mr. MCKNIGHT. Thank you, Mr. Chairman.

I am here on behalf of the Coalition for NRD reform. Mr. Chairman, I would like to thank you, your colleagues and your staff for the time you spent meeting with us and other parties in developing title IV. The time is now to address the serious problems that exist in the NRD program. We commend you for recognizing the meaningful reform of the cleanup program cannot be achieved without

[76] H.R. 2500 § 701(6) (proposed revision to § 101(25) of CERCLA).
[77] H.R. 2500 § 701(9) (proposed § 101(39) of CERCLA).
[78] H.R. 2500 § 701(9) (proposed § 101(46) of CERCLA).
[79] H.R. 2500 § 701(3) (proposed revision to § 101(14) of CERCLA).
[80] H.R. 2500 § 901 (proposed § 12003 of RCRA).

a similar effort to restore the NRD program to its originally intended purpose.

The coalition is generally pleased with the direction in which title IV appears to be headed. In particular, we are happy to see the clear abolition of nonuse damages at long last. In addition, we are encouraged by several key objectives evident in the bill. The focus on restoration or replacement of injured natural resource services, the establishment of cost effectiveness and cost reasonableness requirements for restoration decisions and the clarification of a firm $50 million cap and the role that lost use determination should play in the restoration decisionmaking process. These objectives are sound but we are concerned that without a few important amendments the current language of title IV will not accomplish your intent resulting in a program that may still be fundamentally broken.

Before turning to the specific language issues, I would like to register the coalition's serious disappointment with the most critical aspect of this bill, its failure to explicitly reaffirm Congress's intent in 1980 that retroactive NRD liability is prohibited. The coalition urges the committee to reaffirm this intent in order to stop the ever-increasing litigation over cases that Congress never intended trustees to bring in the first place.

Turning to the $50 million cap, the proposed language needs to be tightened to ensure that the cap applies to the entire area of injured resources. By focusing on how EPA happens to define a particular NPL site or an area of contamination as opposed to an area of injured resources, the proposed language will not prevent trustees from arbitrarily carving up an area into multiple pieces in order to evade the cap. We are not suggesting a nationwide cap here but it is critical that the cap apply to the whole area of injured resources.

I want to focus now on your objective to ensure cost reasonable restoration and how your proposed language inadvertently frustrates this objective. First of all, for the cost reasonableness requirement to work, there must be a rational yardstick for determining when restoration is complete. The widely accepted benchmark is whether the action has reestablished the functions that affect public use, known as human services. For example, fishing, hunting or bird watching. Or those that are important to the public in terms of their ecological significance, such as a wildlife refuge area. The proposed definition of restoration would allow trustees to replicate the exact physical, chemical and biological nature of the injured natural resource even where such actions would have no effect on the services provided.

Second, for cost reasonableness to work, you need to decide what resources require restoration. The obvious answer is those that were previously available for public use. This is known as committed use. The proposed language does not limit restoration to committed uses. This allows trustees to use NRD to create uses that were never available to the public before the natural resource injury occurred.

Third, the proposed definition of timeliness appears to authorize trustees to select unreasonably costly restoration measures simply because trustees want to accomplish restoration sooner. The coali-

tion endorses the principle that restoration should be accomplished as quickly as is cost reasonable but to make timeliness the primary criteria as title IV currently appears to gut the whole cost reasonableness requirement.

Finally, the bill creates a separate new element of damages for lost use. The current statute already requires that lost use be addressed in the restoration decisionmaking process. An example will help explain how lost use and timeliness both fit into the restoration decisionmaking analysis.

Assume two restoration options. The first will take 1 year to complete at a cost of $40 million. The second will take 5 years to complete at a cost of only $1 million. Without information on the value of the lost uses, it is impossible to determine which of the two options should be selected. If the lost use values were $20 million per year then selecting the more rapid 1-year option would be justified because it would be cost reasonable. But if lost use values were only $1 million a year, then spending $40 million to accomplish restoration sooner would not be justified.

So timeliness and lost use are both incorporated into the restoration decisionmaking process and it is unnecessary to consider lost use as a separate, additional element of damages.

Thank you for your time, Mr. Chairman.

[The prepared statement of Kevin McKnight follows:]

PREPARED STATEMENT OF KEVIN MCKNIGHT, MANAGER OF ENVIRONMENTAL REMEDIATION PROJECTS, ALUMINUM COMPANY OF AMERICA, ON BEHALF OF COALITION FOR NRD REFORM

Mr. Chairman, I am Kevin McKnight, Manager of Environmental Remediation Projects for the Aluminum Company of America. I am appearing today on behalf of the Coalition for NRD Reform of which ALCOA is a member together with ARCO, General Electric, Zeneca, ASARCO, FMC, Kennecott, the American Petroleum Institute, the American Automobile Manufacturers Association, Reynolds Metals Company, Fort Howard Corporation, Hercules, Elf Atochem, USX Corporation, Mobil, the American Forest and Paper Association, and the National Mining Association. The Coalition has previously testified before this Subcommittee regarding the need for reforming the natural resource damages ("NRD") provisions of Superfund.

I will not seek to repeat my earlier testimony, but I would like to emphasize the importance of this Committee's effort in addressing NRD issues. This Committee has a unique opportunity to address a problem that is already of major proportions and which is escalating rapidly.

As you know, the NRD program was designed with a limited scope. The purpose was to supplement the clean-up authority of CERCLA, by affording government trustees a right of action in cases where injury to public natural resources resulted from conduct which occurred after CERCLA's enactment in 1980. Liability was meant to be prospective only; was capped at an insurable $50,000,000; and was limited to the government's reasonable costs of restoring, replacing, or acquiring substitutes for any injured resources. Congress rejected authority for additional forms of liability based on "loss of use" of a natural resource by the public.

If trustees were complying with these original limitations, I would not be testifying here today. Unfortunately, natural resource trustees are now asserting claims that Congress never intended them to bring in the first place.

This year, Congress has undertaken a significant effort to make sound policy decisions concerning the nature and extent of clean-up liability and to reform that aspect of Superfund. Congress did this because it recognizes the inequity of retroactive liability. If Congress fails to confirm and clarify the existing limitations on NRD liability, it imperils the important reforms aimed at lowering the costs and eliminating the unfairness of the clean-up program because the problems and abuses will simply be transferred to the NRD program.

This concern is not idle speculation. Based on experience with the program to date, and assertions by trustees about where they intend to take the program, the consequences for private parties and for the U.S. government are staggering. As the

Administration testified before your Committee, they view the NRD program as only just beginning. The accuracy of this statement is reflected in the fact that the Administration regards NRD as an integral, add-on component of a significant percentage of NPL sites. While only 1,300 sites are now on the NPL, EPA has identified approximately 35,000 potential Superfund sites. Clearly, with so many possible Superfund sites, the potential for inflated, retroactive claims for NRD expands exponentially.

Furthermore, many of the recently asserted NRD claims are at sites which are typical of numerous Superfund sites. For example, at the Berks site in Pennsylvania, which is a typical waste reclamation site, the groundwater and soil clean-up costs are estimated at $50 million. However, the NRD claim approximates $550 million. The Berks site is no different from numerous other sites involving potentially contaminated groundwater that is neither used for, nor is expected to otherwise affect, drinking water supplies. Indeed, the State of Pennsylvania, the trustee filing the Berks NRD claim, has indicated the state currently has a "short list" of approximately 20 sites similar to Berks for which NRD claims are likely to be asserted. Assuming the sites are similar to Berks and would generate the same level of NRD claims, this would amount to NRD claims of over $11 billion in Pennsylvania alone. Similarly, in testimony before the House Transportation and Infrastructure Committee, a representative of the State of New Mexico said the state contemplates as many 60 potential NRD cases within New Mexico alone. Assuming only 10 western states had similar portfolios, this would amount to 600 sites in the west alone.

Fifteen years ago, no one expected the average Superfund clean-up costs would approximate $30 million. Today, the emerging trend in the magnitude of NRD claims suggests the NRD program may dwarf the clean- up aspect of Superfund. For example, claims at Clark Fork River, Montana ($635 million), Berks, Pennsylvania ($550 million), Coeur d'Alene, Idaho ($1.4 billion), Los Angeles Harbor, California ($1.2-$1.8 billion), Kennecott Mining Region, Utah ($129 million), Commencement Bay, Washington ($700 million), Fox River, Wisconsin ($500 million), and Massena, New York ($1 billion) are rapidly becoming common.

Moreover, the potential federal NRD liability is enormous. According to a 1995 GAO Report, the Department of Energy is estimated to have $300 billion in clean-up liability alone, not including NRD. Representatives of the National Oceanic and Atmospheric Administration ("NOAA") have testified before the Congress that the Energy Department's NRD liability will only be 5-10% of its clean-up costs, that is $15-30 billion. However, NOAA's assertion of only $15-30 billion in NRD liability appears to be overly optimistic when compared to many of the current NRD claims against private companies where the NRD claim is a large multiple of the clean-up costs. For example, at the Berks site, the NRD claim is approximately 10 times the clean-up costs.

The 1995 GAO Report also indicated the Department of Defense had thousands of facilities potentially affected. A July, 1993 Majority Staff report of the House Natural Resources Committee concluded the Interior Department faces a "multi-billion dollar size" debt for clean-up alone. In fact, the just released Report of the Federal Facilities Group states the potential clean-up costs at Defense Department facilities is estimated at $26.2 billion and for Interior Department sites $3.9-$8.2 billion. The Department of Agriculture and NASA add another $4.0-$4.5 billion. When NRD costs are added to these clean-up costs, the impact on the federal budget for these Departments could be as staggering as it is for the Energy Department.

The simple facts are that we are on the threshold of an enormous problem. The time to address this issue is now, not when the problem has spun out of control. Given that perspective, we are pleased with the objectives of Title IV. Its sponsors and their staff are to be commended for recognizing that the NRD program has been twisted beyond recognition and for seeking to develop legislation to restore the NRD program to its originally intended purpose.

While we are greatly pleased with many aspects of Title IV, there are a few issues about which we are unclear or have concerns and we would like to focu ; on those issues. With the exception of the first two issues, retroactivity and the $50 million cap, virtually all of our questions revolve around the process by which trustees make decisions, for that is where the NRD program has gone awry and could continue to go awry without some small but extremely significant changes in Title IV.

RETROACTIVITY

The Coalition is disappointod Title IV fails to clarify Congressional intent that the NRD program is not retroactive. Although we believe the current statutory language does not impose retroactive NRD liability, trustees have argued otherwise and have asserted enormous claims for activities occurring decades before 1980. Such claims

are inconsistent with Congressional intent exemplified in the 1980 Senate Commerce Committee report which stated CERCLA "allows for recovery only of prospective natural resource and property damages."

Supporters of retroactivity ignore the fact that the conduct they want to retroactively condemn was legal at the time it occurred, was often the result of a specific governmental policy to encourage industrial development, and resulted in significant public benefits in the form of job creation and economic and industrial development. Moreover, the purpose of restoration is to restore services which had been committed to public use. In most cases of retroactive claims, the site in question was never in "public use." In most instances, the site historically was committed to industrial or commercial use with the support and involvement of the local community as well as the federal, state, and local governments.

Proponents of retroactivity often respond by asserting that the beneficiaries of industrial development should pay for restoration. Often, the present owner who is being sued had nothing to do with the causes of the pollution. Retroactivity proponents fail to see the inherent inequity in this approach and assert corporate America is the generic beneficiary of development and should pay for restoration. This approach to assigning the responsibility for restoration ignores the fact that federal, state and local governments, including trustees, generally encouraged the industrialization and benefited from the collection of royalties, severance taxes, property taxes, payroll and income taxes, sales taxes, etc. The local communities also benefited from increased employment. If the beneficiaries of industrial activity are to be retroactively liable, then the list of beneficiaries should not be limited to the current corporate owners of sites.

It is also notable that many of the state trustees who are so vigorous in their opposition to the Coalition's views on retroactivity are asking this Congress to adopt positions that the voters and legislators of those states have rejected as a flawed policy. For example, the State of Montana, which is pursuing a $635 million NRD claim for the Clark Fork River, is barred by Montana's Constitution and laws from imposing NRD liability retroactively. Article XII of the Montana Constitution expressly prohibits retroactive legislation. Pennsylvania's statutory authority to recover NRD is prospective only. In New Jersey, the courts have held the State's NRD liability is prospective only. In Massachusetts, the State's NRD program does not have retroactive effect and courts have determined it would be an unconstitutional taking of property without due process to impose liability for an action when there was no liability at the time the action was undertaken. The NRD programs in California and Washington are prospective only. Today, many trustees are asking you to adopt a policy which their own states have already rejected as inappropriate.

Congress also rejected retroactivity when Congress considered the Oil Pollution Act of 1990. That Act specifically provided it would only apply to incidents "occurring after the date of enactment of this Act." 33 U.S.C. 2701, note. The Act's legislative history clearly evidences Congressional intent that retroactive liability was an inappropriate policy. The section-by-section analysis inserted into the Congressional Record by the Chairman of the House Committee with jurisdiction stated the legislation would "apply with respect to an incident occurring only after the date of enactment of this Act."

The Coalition for NRD Reform strongly urges the Committee to clarify that NRD liability is not retroactive in Superfund, thereby making it clear that what Congress intended in 1980 continues to be Congress' intent. In this regard, it is very important to recognize that if retroactivity is repealed for clean-up actions, and a clear anti-retroactivity statement is not included for NRD, the likely scenario is that government authorities will simply reclassify clean-up actions as "restoration" and will attempt to shift the clean-up program into the NRD program to assert claims against PRPs who would not be retroactively liable for clean-up costs. The net result will be that the reforms you are contemplating regarding cleanup liability will be circumvented.

THE $50 MILLION CAP

When Congress enacted Superfund in 1980 it did so with the understanding stated by Senator Stafford, manager of the Senate bill, that "we placed a $50 million limit on compensation for each incident of natural resource damage." The Administration and other Members of the Senate Commerce Committee also expressed the view that a limitation on NRD costs was an essential element of the legislation. Senator Cannon, Chairman of the Commerce Committee, stated:

> A principal concern raised by S.1480 relates to the establishment of broad and unlimited liability. Numerous groups have testified before the Committee that S.1480 in fact would cause severe economic disruption. The Depart-

ment of Transportation has testified in this regard that the insurance problems engendered by this liability would be particularly acute for the small railroads in this country. The Environmental Protection Agency testified in support of a dollar limit. Without any such limit, the liability exposure is potentially enormous.... Therefore, I have instructed staff to work on amendments, for introduction on the floor, which would respond to these problems.

Although the Administration and the Congress clearly saw the $50 million limitation on liability as an essential component of the legislation 15 years ago, trustees have effectively subverted that intent by claiming the $50 million cap applies to each release as the trustees have defined that term. Trustees have interpreted "release" to include each day or spot where seepage occurs. This interpretation renders the cap meaningless.

An example of how the definition of the term "release" as interpreted by trustees breaches the $50 million cap can be seen by applying the trustees' legal theory to claims at the Army's Rocky Mountain Arsenal. The situation at the Arsenal also demonstrates the potential NRD problem for the U.S. government. Regarding the Arsenal, the State of Colorado has filed an NRD complaint alleging releases have occurred since tho U.S. began using the property in 1942. Assuming actual NRD releases ceased by the end of 1983 when the groundwater containment and treatment systems were fully operational, there could be thousands of days of potential NRD liability based on the theory that if the pollution plume spread each day, there would be a separate release each day. That theory of liability, which has been applied by trustees against the private sector, could result in NRD liability claims against the Department of the Army for billions of dollars. This example shows how retroactive liability, combined with the trustees' evisceration of the cap, can generate enormous potential liabilities. To defend against such claims, it is essential that the legislation establish a firm $50 million cap for restoration flowing from the site which is the cause of the contamination.

Congress' intent to establish a firm $50 million cap for NRD was grounded in the recognition that site clean-up is completed or well underway before the NRD process begins. Therefore, any threats to human health and to fish and wildlife are already abated, usually at great expense. Congress intended that any additional costs imposed by NRD claims would have firm limits. In fact, once the clean-up removes the threat to the environment, natural processes resume. Typically, the issue in an NRD claim is not whether recovery will occur but the rate at which such recovery will proceed. Congress properly determined that $50 million was an adequate sum for restoration activities such as the planting of trees, restocking of fish, etc. We urge you to affirm that intent by enacting a clear $50 million cap.

The Superfund reform outline issued by the Committee leadership, and the accompanying press statements, indicated Title IV would establish a firm $50 million cap for NRD. The Coalition was very pleased with those statements. However, Title IV does not appear to carry out that intent.

Title IV appears to allow for multiple caps for different areas of contamination, even though the contamination in all of those areas results from the same disposal activities. Under Title IV, it appears trustees can circumvent the cap simply by establishing different and multiple geographical boundaries. Specifically, Title IV establishes a $50 million cap for NPL sites and a $50 million cap for contiguous areas of contamination not listed on the NPL. But what happens if an NRD claim is filed which encompasses an existing NPL site and an area outside its boundaries? Title IV appears to establish a $50 million cap which stops at the geographic boundary of the NPL site and a second cap which applies beyond that boundary. Thus, from one incident there could be two caps totaling $100 million. Similarly, assume there is one spill in a river which, because of currents, concentrates in geographically separate areas and does not present an NRD problem in between. Using the language of Title IV, a trustee simply defines the contaminated areas as non- contiguous and the intended $50 million cap becomes multiples of $50 million.

The Coalition applauds your intent to establish a firm $50 million cap for NRD but the language in Title IV is so tightly drawn and restrictive that it does not effectuate that objective.

THE RESTORATION OBJECTIVE

The principal day to day problems plaguing the NRD program are the definitions of what is to be restored and how it is to be restored. Quantifying the value of damaged functions has proven to be one of the most troublesome aspects of the current NRD program, particularly where trustees assert retroactive NRD liability and seek to recreate environmental conditions that existed many decades ago in a pre-indus-

trialization environment. Further complicating the problem is the fact that often activities other than the release at issue contributed to environmental change. Separating the relative contribution of all of these various factors is extremely difficult when one is talking about restoring specific functions such as the food chain relationships of various amphibians or the chemical properties of the environment.

The fundamental point, too often overlooked by trustees, is that the purpose of the NRD program is to restore the services such as fishing that the resource previously provided to the public. The objective is not to replicate each and every biological function existing in the pre- industrialization environment for its own sake. Chemical, biological and physical functions are relevant only to the extent they substantially affect the ultimate services used by the public.

The distinction between restoring the services versus functions is best seen in deciding whether the restoration objective is to replace every member of every wildlife or plant species or whether the objective is to restore the services provided to and used by the public. Thus, if a stream provided the public with fishing opportunities, the restoration objective should be to provide a similar level of public fishing opportunities. The restoration objective should not be to replace every individual member of every species and every biological interaction which existed in the pristine pre-industrialization environment. Trustees have ignored the fundamental purpose of the NRD program point by pursuing restoration remedies that go far beyond what is needed to restore preexisting resource services to the public. For example, an accidental chemical spill caused large losses of fish in a California river that had for decades been maintained as a stocked fishery for the public. The river, however, recovered rapidly, and could have been promptly restocked and returned to its previous ecological function of supporting a recreational fishery. The trustees, however, pursued far more ambitious and costly measures supposedly justified by the goal of securing ecological functions that had nothing to do with the river's function as a recreational fishery. As a result, re-establishment of the fishery for public use was greatly delayed.

It is unclear from the interplay between the definitions of "restoration," "cost-effective," and "cost-reasonable" whether Title IV is requiring the restoration of services or of every biological function. It is this type of ambiguity which has created the opportunities for trustees to derail Congressional intent.

The ambiguity in Title IV arises from the definition of restoration which requires the re-establishment of "measurable and ecologically significant functions, including public use...." The "including public use" language, coupled with the word "functions," suggests public use is a subset of functions and the intent is to restore public use, i.e., services, plus something else. Thus, it implies authority for the restoration of functions that are not related to public use. Allowing trustees to require the restoration of functions as distinct from the restoration of services focuses the NRD program away from restoring what has been lost to public use and toward costly efforts to restore the pre-industrialization environment. We believe the objective of the NRD program is to restore services lost to the public and urge the Committee to conform the actual definition of "restoration" with the restoration of services concept contained in the definitions of "cost-effective" and "cost-reasonable."

COMMITTED USE

Another aspect of defining the restoration objective is identifying the resource services actually lost to the public. Of course, for a resource to be lost to the public, it must have been available for public use in the first place.

Where a resource was not available for public use at the time of contamination, there should be no restoration obligation. An example of where the NRD program has gone awry in this respect is seen in one recent case where trustees claimed that trees on private property had been injured and asserted an NRD claim because non-endangered migratory birds and deer were deprived of the shelter and other benefits of the trees. The private landowner, however, had no obligation to maintain the trees for the birds or the deer. In fact, if the trees had been destroyed for some reason other than the contamination, such as a fire caused by lightning or even the owner's desire to cut down the trees, there would have been no NRD liability. If the trees were not committed to public use, why is there an NRD claim?

The purpose of the NRD program is to restore resource services lost to public use. Thus, the essential question in deciding what is to be restored is whether the resource in question was, in fact, committed to public use. Significantly, existing regulations at 43 C.F.R. 11.14(h) recognize this fact and define "committed use" as a current or planned use for which there is a documented legal, administrative or financial commitment. Unfortunately, this regulatory provision is applicable only when trustees seek to determine the so-called lost use value of the resource. If the com-

mitted use concept makes sense with respect to the computation of lost use value, then it applies with equal force to defining the services to be restored in long-term restoration plans.

In fact, the Interior Department's regulations already make committed use the reference point for restoration decisions in one context. A trustee cannot claim damages for restoring water to Safe Drinking Water Act levels if the affected water was not used for drinking water at the time of contamination. Again, the principle is if the resource is not committed to public use it should not be subject to the NRD program to begin with. This logical principle should be applied in all restoration decisions. The statute and the regulations should provide a consistent message so as to avoid ambiguities and potential disputes and litigation.

Title IV should require that NRD claims apply only to areas committed to public use at the time of the contamination. However, it appears that Title IV, applies the committed use concept only to the computation of lost use. This creates an unfortunate negative implication that this concept does not apply when trustees identify the resource to be restored in the permanent restoration plan.

Related to the question of whether an area is committed to public use is whether trustees can assert NRD claims only for areas owned by or controlled by the trustees, or whether trustees can also assert claims for resources on private property. Allowing trustees to assert NRD jurisdiction over areas "appertaining to" those owned or controlled by the trustees, or to make claims for resources "managed by" the trustees, provides boundless trustee jurisdiction.

Under the "managed by" formulation of trustee authority, trustees with authority over birds could assert an NRD claim over any area in which birds might alight simply because the birds are "managed by" the trustee. In the example of whether trees on private property are properly subject to trustee jurisdiction, if trustees have the authority to assert claims for resources "managed by" the trustee, then the loss of habitat for birds anywhere in the country, whether on private or public land, could be the subject of a trustee claim. From another perspective, could it be said that trustees with zoning or similar land use authority "manage" all lands in the state and, therefore, can claim all such lands are under their trusteeship.

Similarly, there is no limit to the concept of "appertaining to" under the old playground theory that the foot bone is connected to the leg bone which is connected to the knee bone, etc. I do not mean to make light of a serious matter, but the fact remains that the purpose of the NRD program is to restore resources committed to public use, resources to which the public has access, and that means resources owned or controlled by the trustee. Title IV should be amended to provide this clarification of trustee authority.

State trustees assert that if their trusteeship is limited to areas they own or control, it will prevent them from protecting public resources. In considering the states' position, a few points must be borne in mind. First, it is interesting that existing law provides that federal trustees can only assert claims for areas owned or controlled by the federal trustee. 42 U.S.C. 9607(f). Judging by their actions, federal trustees have not found this language confining. Second, in arguing that "owned by" language is too restrictive, states have claimed that it would prevent them from protecting groundwater. However, the facts are that the NRD program is unnecessary to groundwater cleanup. Groundwater cleanup is addressed elsewhere in Superfund. NRD is the post-cleanup phase of Superfund. NRD occurs after pollutants have been removed or abated. Moreover, a quick review of the law in some states shows that states like New Mexico and California already have laws declaring groundwater to be owned by the state. In such states, groundwater would be considered to be owned by the state.

LOST USE SHOULD BE PART OF THE OVERALL RESTORATION PLAN

Before beginning a discussion of lost use issues, the Coalition would like to applaud the elimination of damages for non-use values. Since the purpose of the NRD program is to restore resources committed to public use which the public can no longer use, then the computation of non-use value, the monetary value of simply knowing the resource exists even though you may never use it, has nothing to do with restoration and everything to do with punitive damages. Title IV properly prohibits the collection of punitive non-use monetary damages.

For similar reasons, Title IV should prohibit the collection of lost use damages as a separate category of costs. Lost public uses are already taken into account in restoration measures to reestablish such uses. If lost use values are considered separate from the restoration of the resource, lost use becomes punitive damages over and above the costs of actual restoration. This fact becomes clear by examining what lost use is all about.

In cases where permanent restoration may take a number of years, it may be appropriate for trustees to provide temporary resource substitutes in order to provide the services that the public would lose by reason of the delay. For example, if it takes five years to permanently restore a popular public wildfowl hunting area, a trustee might lease an equivalent nearby hunting area for public use during the five year period. The provision of the temporary substitute would be part of the overall restoration plan, and the costs of providing it would be part of restoration costs. This is the appropriate means of dealing with the problem of lost use.

Under Title IV, however, trustees could seek separate recoveries for lost use, including past losses of use, and apply these recoveries to the purchase of a second hunting area. At the end of the five-year restoration of the injured area, the trustee will own two waterfowl hunting areas, the permanently restored area and the second area acquired through lost use recoveries. The persons responsible for contamination will have paid for restoration not once, but twice. As this example shows, lost use is a separate item, it becomes a punitive damages program, not a restoration program.

As noted above, Title IV establishes lost interim use as an additional cost on top of restoration. Title IV says the measure of natural resource damages is the cost of assessment, restoration, and lost use. The Coalition urges this Committee to amend Title IV to ensure that interim lost use is not a separate element of recovery divorced from the long- term restoration plan. Lost use should be part of, and subsumed within, the permanent long-term restoration plan. Thus, in determining the amount of long term restoration remaining to be done, the amount of interim lost use restoration already done or being done should be considered as reducing the long term restoration needs.

It is notable that state trustees arguing that separate lost use damages are appropriate under federal law are precluded from making such claims under state law. For example, California, Massachusetts, Montana, Pennsylvania and Washington do not allow for the recovery of lost use or non-use values. Thus, a state like Montana, which has claimed NRD damages of $281 million for lost use and non-use values at Clark Fork River, would not be able to maintain that claim under the laws adopted by the citizens of that state.

CONTINGENT VALUATION METHODOLOGY SHOULD BE PROHIBITED

Although we are very pleased Title IV prohibits the collection of damages for the loss of so-called non-use values, this provision will not end the use of the widely condemned contingent valuation methodology ("CVM"). CVM could still be used to determine the monetary amount of lost use damages. With the exception of trustees who clearly have an interest in methodologies which can ratchet up NRD claims, no one seems to be defending CVM.

The problem with CVM is seen in a 1993 evaluation of several "state-of- the-art" CVM studies for non-use values. The study is important because many of the problems that plague CVM in the non-use context also exist when it is used to place a dollar value on lost use. The 1993 evaluation found "state-of-the-art" CVM tests could be used to show the American public was willing, over 30 years, to pay $6.83 billion to decrease air pollution and increase visibility at the Grand Canyon from 112 to 114 miles, a 1.7% improvement; $215 billion to conserve 1,743 pairs of northern spotted owls, or $123.4 million per pair; $625 billion to conserve 168 endangered whooping cranes, or $3.72 billion per bird; and $244 million to save 40,000 seabirds from oil spills, or $6,100 per bird. Given that the contributions by all Americans to all environmental protection and wildlife causes totaled only $2.3 billion in 1990, CVM studies get results out of proportion with reality.

Because CVM is such a flawed methodology, the Coalition recommends that Title IV specifically forbid its use.

STATUTE OF LIMITATIONS

The purpose of statutes of limitation is to protect potential defendants from the prejudice of having to defend against ancient and now stale claims. An issue has emerged in the drafting of Title IV because trustees are insisting that the NRD statute of limitations should not begin to run until after the trustee has completed its damage assessment. Another way to say that is the statute of limitations does not begin running until after the trustee determines the connection between the release and the damage to the resource. Such language effectively nullifies the whole concept of a statute of limitations and imposes no requirement that the trustee even begin an assessment or any other study to determine the connection between the resource damage and the release in question. Under such a system, the statute of limitations does not begin to run until the trustee decides it should run and until

after the assessment is completed. The trustees legal theory is to effectively remove any statute of limitations from the law.

The trustees' legal theory that the statute of limitations does not begin to run until they want it to is contrary to American jurisprudence. Every law student learns in his or her first year of law school that the statute of limitations begins to run from the time the injured party knew or should have known of the loss. That is the general standard already codified in CERCLA for the commencement of actions. Such a standard is also consistent with the well-established toxic tort discovery rule. It is important to remember that due to CERCLA's punitive system of strict, joint and several liability, many PRPs get caught in the Superfund and NRD web without having done anything illegal. It is important that these PRPs not be saddled with unending uncertainty about their NRD obligations, particularly where trustees assert retroactive NRD claims based on conduct occurring long ago.

Therefore, we suggest that Title IV clarify the existing statute of limitations in CERCLA to bring it into conformity with the traditional discovery rule that the statute of limitations begins to run when the injured party, in this case the trustee, knew or should have known of the loss.

ELIMINATING THE REBUTTABLE PRESUMPTION

Title IV wisely eliminates the provision from existing law providing that assessments done in accordance with regulatory procedures are entitled to a rebuttable presumption of validity. Instead, Title IV simply says such assessments are to be done in accordance with the assessment regulations or a comparable procedure. The unanswered question in Title IV is what is the judicial standard of review if an assessment is done in accordance with the procedures spelled out in the regulations.

Before focusing on that question, it is worth noting what the assessment regulations consist of. The assessment regulations simply spell out the process by which the assessment is undertaken. The regulations do not have anything to do with how those processes are applied and the conclusions reached from those processes. Therefore, NRD assessments are not comparable to other agency decisions for which judicial deference may be appropriate. In fact, I am reminded of the old saw that there are statistics and damn statistics because a skilled statistician can allegedly reach most any result using approved procedures. The same is true under the assessment regulations.

For that reason, we urge that Title IV be amended to clarify that trustees, like all plaintiffs seeking monetary damages, must prove their case in court. Title IV should not be ambiguous and allow trustees to claim their conclusions are assumed accurate, or due deference, as long as the trustee, like the statistician, has followed all the approved procedures.

COST-EFFECTIVE RESTORATION PLANS

Title IV is to be commended for requiring that trustees select cost- effective and cost- reasonable restoration plans. These provisions are fully consistent with the original 1986 NRD regulations which required the selection of cost-effective restoration proposals. Sadly, this requirement has now been deleted and cost-effectiveness is now only one of ten factors trustees may consider, if they wish, in developing restoration plans.

This regulatory change was not consistent with Congressional intent. In fact, the 1980 Senate Committee Report stated: "The Committee intends that actions to restore, rehabilitate or replace natural resources under the provisions of this act be accomplished in the most- effective manner possible."

We are pleased with the cost-effective and cost reasonable language in Title IV which reaffirms Congress' intent in 1980. However, we are concerned about that portion of Title IV which requires that restoration actions be achieved in a "timely manner." Moreover, Title IV requires that the term "timely" means the shortest period necessary that "takes into account" cost effectiveness and reasonableness.

While timeliness is an important function of the restoration decisionmaking process, it is also important to recognize that what is reasonable and cost-effective if restoration is to be done in one year is far different than if restoration is to be done over five years. Alternatives which might be cost-effective over five years are excluded from consideration if the trustee demands restoration be completed in one year. Unfortunately, Title IV permits trustees to circumvent the cost- effective and cost-reasonable standards because it says trustees decide timeliness taking into account the cost effectiveness and reasonableness. "Take into account" is another version of that famous legislative concept "consult" which is so often used and which means "I have to consider your views but I do not have to do anything."

To address timeliness, Title IV should delete the "take into account" language and instead require the measurement of the incremental costs and benefits of different restoration alternatives over various possible time periods. This will ensure that when restoration is accelerated the costs of restoration do not exceed the benefits. This automatically introduces a timeliness evaluation by providing that if restoration is to be accelerated to one year instead of five years, then the additional benefits must outweigh the additional costs.

What the trustees are seeking from this Committee is a consideration of timeliness that will allow them to first determine the time frame within which restoration is to occur and then to determine what is cost- effective and cost-reasonable within that time frame. Such a methodology effectively eliminates a cost-effective and cost-reasonable test because these tests can be circumvented by arbitrarily-selected time frames.

CONCLUSION

Title IV offers many improvements over the status quo, and the comments made today should not be interpreted as overlooking or ignoring those achievements. We commend the sponsors of Title IV for their efforts and simply wish to note areas where we believe additional changes, which are fully consistent with the overall thrust of Title IV, should be made.

Mr. OXLEY. Thank you, Mr. McKnight.

Ms. Foster.

STATEMENT OF CAROL R. FOSTER

Ms. FOSTER. Good afternoon. I am Carol Foster, manager of government relations for the Chesapeake Corporation, a Fortune 1,000 company headquartered in Richmond, Virginia. We have 40 manufacturing sites in 13 States.

As an innovative packaging, paper and forest products company founded in 1918, Chesapeake and its employees have maintained a steadfast commitment to protecting the environment in all that we do. For example, our Wisconsin subsidiary in Nashua, Wisconsin, which Chesapeake acquired in 1985, recently celebrated its 80th year in business. For every year in existence, Wisconsin Tissue has utilized as its raw material 100 percent recovered fiber from a variety of paper sources to manufacture napkins, toilet tissue and toweling. Annually, this facility utilizes over 300,000 tons of recovered paper.

Rather than millions of tons of magazines, mixed office waste and other types of post-consumer paper products being sent as trash to be landfilled or burned, a whole recovery industry has grown up to service this manufacturing market segment by collecting, sorting and delivering recovered materials to Chesapeake and to other paper manufacturers.

At Wisconsin Tissue and at our craft and packaging facilities as well, Chesapeake has practiced leading edge compliance thinking. Since 1983, Chesapeake has utilized an ongoing environmental audit program to monitor at regular intervals compliance with environmental laws and regulations thus ensuring the health and safety of our employees, customers and communities.

With these examples of Chesapeake's corporate thinking, you will understand why, when PCB contamination was discovered in the Fox River in 1992 and recycled paper mills were suspected as the source for this contamination, it was natural for Chesapeake and Wisconsin Tissue to join with other paper companies, local municipalities, counties, area businesses, public sewerage treatment facilities, Green Bay Remedial Action Plan Citizen Advisors and the

State of Wisconsin to create the Fox River Coalition. The suspected PCB contamination for Wisconsin Tissue and for other paper mills was carbonless copy paper, which was part of our recycling mix.

As you can see from my written testimony, the goal of this unique public/private partnership was and is to develop the process for voluntary cleanup and restoration of PCB contamination in the lower Fox River. In addition to determining cleanup levels, the coalition is to determine cost-effective methods, funding mechanisms and timetables for contaminated sediment remediation. As such, it deals with an environmental issue that has current and long-term impacts to human health, fish, wildlife, recreation and navigation of the lower Fox River.

Its planning efforts have benefitted from technical assistance from the U.S. Army Corps of Engineers, the U.S. Fish and Wildlife Service and policy support from USEPA. However, despite documented progress as outlined before you in the testimony, the Fish and Wildlife Service chose to affiliate only in this in an advisory capacity and not to join or be supportive of the coalition's approach.

When it rejected the work of the coalition 2 years into the process and elected to pursue a natural resource damage assessment by naming 5 coalition members as potentially responsible parties, Chesapeake's focus and efforts became largely redirected away from restoration and remediation of the Fox to defending against the potential natural resource liability.

Chesapeake's concerns are that environmental improvement will be substantially delayed and the primary intent of CERCLA, which is cleanup, is thwarted by this shift in our focus. In addition, this innovative approach could already have served as a demonstration project and could have been replicated in the other 43 already identified hot spots across the Great Lakes or, for that matter, wherever similar problems exist and public/private entities choose to come together to fashion solutions to them.

As I also indicated in my written testimony, if some of the refining provisions of title IV which you are deliberating now had been in place during the beginning of this process, we believe the coalition's efforts would be further along than they are 3 years later. For example, we believe that voluntary efforts such as we have undertaken in the Fox should be encouraged to go forward with the majority of trustees concurring in a timely manner. We believe the 180-day rule requiring the trustees to join in the action from its earliest point to be an important addition to title IV.

If there had been a requirement for Fish and Wildlife to become committed to this coalition sooner, there is every reason to believe that the Lower Fox River Sediment Remediation Project would have been included in the Water Resource Bill considered by the U.S. Senate just 2 months ago. In addition, the cost effective and cost reasonable provisions of this bill go a long way toward clarifying how appropriate restoration is to be measured and to take place. We urge your consideration in joining these in some nexus which ensures the costs do not outweigh the benefits when an accelerated program of restoration becomes the most desirable goal.

Obviously, the experience of Wisconsin Tissue and other legal dischargers who find themselves in situations involving unexpected contamination also stresses the need for a cap that is as clearly de-

fined as possible. Since the proposed $50 million cap is a restoration amount and will come after or jointly with the expense incurred to remediate any contaminated site, care must be taken in defining the lost services to be restored for public use.

Thank you for the opportunity to outline a real case scenario faced by a responsible corporate citizen which has pledged itself to environmental stewardship and has found itself confronted by the existing language of CERCLA and the complexities of its real life application.

[The prepared statement of Carol R. Foster follows:]

PREPARED STATEMENT OF CAROL R. FOSTER, MANAGER, GOVERNMENT RELATIONS, CHESAPEAKE CORPORATION

Mr. Chairman, I am Carol Foster, Manager of Government Relations for the Chesapeake Corporation, a Fortune 1000 company headquartered in Richmond, Virginia, having 40 manufacturing operations in 13 states.

As an innovative packaging, paper and forest-products company founded in 1918, Chesapeake and its employees have maintained a steadfast commitment to protecting the environment in all that we do. To that end, the company has long been an industry leader in many of the topical issues deliberated upon by the members of this committee, which have an impact on the environment.

For example, our Wisconsin tissue Mills subsidiary in Menasha, Wisconsin—which Chesapeake acquired in 1985—recently celebrated its 80th year in business. For every year of its existence, WTM has utilized as its raw material, 100 percent recovered fiber from a variety of paper sources.

Annually, this facility utilizes over 300,000 tons of recovered paper in manufacturing napkins, toilet tissue and toweling for sale to away-from-home markets—primarily hotels, restaurants, and large food service suppliers. Without the foresight and innovation of this business, millions of tons of magazines, mixed office waste and other types of post-consumer paper products would have been sent as trash to be landfilled or burned. Instead, a whole recovery industry has grown up to service this manufacturing market segment by collecting, sorting and delivering recovered materials to Chesapeake and other paper manufacturers.

At Wisconsin Tissue, and at our kraft and packaging facilities as well, Chesapeake has practiced leading edge compliance thinking. Since 1983, Chesapeake has utilized an ongoing environmental audit program to monitor at regular intervals compliance with environmental laws and regulations, thus ensuring the health and safety of our employees, customers and communities.

From these few examples of Chesapeake's corporate thinking, you'll understand why when PCB contamination was discovered in the Fox River in 1992, and recycled paper mills were suspected as a source for this contamination, it was natural for Chesapeake and Wisconsin Tissue to join with other paper companies, local municipalities, counties, area businesses, public sewerage treatment facilities, Green Bay Remedial Action Plan citizen advisors and the State of Wisconsin to create the Fox River Coalition.

As you know, PCBs are a class of chemical compounds used during the 1950s and 60s in a variety of commercial and industrial applications such as electrical transformers and capacitors, casting wax, cooling systems of mining machinery and other normally closed electrical systems. They were also used in production of carbonless copy paper which was recycled by several deinking paper mills, including Wisconsin Tissue, on the Fox River.

The goal of this public/private partnership was—and is—to develop the process for the voluntary clean-up and restoration of PCB-contaminated sediments in the lower Fox River.

In addition to determining clean-up levels, the Coalition is to determine cost-effective methods, funding mechanisms and timetables for contaminated sediment remediation. As such it deals with an environmental issue that has current and long term impacts to human health, fish, wildlife, recreation, navigation and beneficial uses of the Lower Fox River. Its planning efforts have benefited from technical assistance from the U.S. Army Corps of Engineers, and U.S. Fish and Wildlife Service and policy support from the U.S. EPA.

The Coalition has enjoyed the strong support of all key local officials, the Governor of Wisconsin, and the Wisconsin Department of Natural Resources. In fact, Governor Thompson in a letter to Speaker Gingrich emphasized the unique aspects of the partnership by saying, "the Wisconsin Department of Natural Resources has

characterized this public/private approach as 'unprecedented' and has noted that matters have moved forward with a velocity not seen in more typical situations marked by litigation."

For more than two years, the Coalition made progress in determining the quantity, location, timing, and possible methods of remediating contaminated sediment in 39 miles of the Fox River. To that date—August 1994—the Coalition had:

- Examined all existing data on over 300 miles of river, identifying four priority cleanup sites containing a major portion of the total polychlorinated biphenyls (PCB) mass;
- Assisted in data collection to further characterize an additional 7 miles of river;
- Reviewed contractor proposals and commissioned the negotiation of contracts for remedial investigation and feasibility study (RI/FS) work; and
- Raised $650,000 from industry, publicly owned treatment works, county governments, and the State of Wisconsin to fund RI/FS work at the priority sites.

However, despite this documented progress—and even though the U.S. Fish and Wildlife Service (FWS) had been participating in the Coalition's technical subcommittee and had been invited to become a full participating member of the Coalition—FWS was not supportive of the Coalition's approach.

Again, despite the recognition of the Coalition as the most efficient and effective means of achieving contaminated sediment remediation, the U.S. Fish and Wildlife Service (FWS) in August 1994—two full years after the inception of this Coalition's work—elected to reject the Coalition's approach by pursuing a Natural Resource Damage Assessment (NRDA) and by naming five Coalition members as potentially responsible parties (PRPs).

The PRPs were given 30 days to indicate whether they wished to participate in the formal NRDA process. The PRPs responded to the FWS's action by requesting a 60-day extension of the response period in order to discuss how FWS and the Coalition could cooperate outside of the formal NRDA process. The Solicitor's office of the Department of the Interior (DOE) rejected the request, offering little optimism that a cooperative approach would receive consideration. At the same time, regional FWS officials intimated that their hands were tied, and that the Solicitor's office was making policy decisions in this matter.

Our firm belief is that the Coalition could complete the Fox River project using a far speedier and more cost-efficient method of addressing sediment contamination than would be possible under the formal NRDA process. On the other hand, the actions by the FWS threaten the Coalition's progress towards identifying, financing, and implementing a remedial strategy for the Fox River, and may convert this cooperative, regional partnership into a litigative, adversarial relationship resulting in dissolution of the Coalition.

Ultimately, environmental improvement will be substantially delayed, as evidenced by the fact that we are now another year into the process with little progress to show from the entrance of FWS's efforts to force a Natural Resource Damage assessment prior to the remediation phase of this process. Additionally, without the obstacle thrown into the path by FWS, this innovative approach could already have served as a demonstration project and could have been duplicated in the other 43 identified hot spots across the Great Lakes, as well as in similar situations in other States, successfully initiating what the primary intent of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) is—the clean-up of contaminated sites.

To recap, what this means to Chesapeake Corporation and Wisconsin Tissue one year later is:

- WTM and the four other PRPs have requested that the U.S. FWS delay the proposed damage assessment to permit voluntary restoration and remediation to proceed.
- The focus and efforts of the PRPs have been largely re-directed away from restoration and remediation of the Fox River to defending against the potential natural resource damage liability.

This brings us to the deliberations of this committee on Title IV pertaining to NRD reforms which will reaffirm legislative intent, provide structure for damage assessment, help shape this segment of the Superfund program which is still in its formative stages and define this whole new area of public policy debate and potential legal turmoil.

First let me say that we are pleased with the responsiveness of this committee in recognizing that the NRD program as it is being applied currently invites "piling on of liability," with little certainty of an end, and without a cap of insurable proportions. We appreciate your efforts to develop legislation which will restore the NRD program to its intended purpose and eliminate the ambiguities and expansions that occur when interpretations are made.

From my brief history of Wisconsin Tissue you can see how unequivocally the retroactive liability provision needs to be clarified. Wisconsin Tissue has been in business for 80 years. During only 10 years has Chesapeake owned it. Even initiating liability from the year 1980 provides a window of exposure for the entity from which we purchased the company.

Regarding the $50 million cap, it is essential that the legislation establish this cap as the restoration ceiling for contamination flowing from the site which is the cause of the contamination. Language which permits each daily release to count as a separate occurrence cannot be permitted, as it makes this or any cap meaningless.

We have additional concerns relating to the "contiguous" language, which we believe permits latitude to determine a single incidence of contamination—because of the area it covers—to be deemed "non-contiguous," and therefore to expose a company to multiples of the $50 million cap.

Voluntary clean-up efforts such as that undertaken by the Fox River Coalition should be permitted to go forward, especially during the clean-up phase, with the majority of trustees concurring in a timely manner.

We believe the 180 day rule to designate a lead trustee to be an important addition to this legislation. If there had been a requirement for the FWS to have become committed to this Coalition sooner, the Lower Fox River Sediment Remediation Project would probably have been included in the Water Resource bill considered by the U.S. Senate just two months ago.

Without the Department of Interior's indication of what course of action it would follow, however, there was simply too much discomfort relative to including this demonstration project and being able to quantify how DOI/FWS's actions would impact funding requirements. Even knowing this was not a Superfund site and that EPA and all relevant Wisconsin entities supported the Coalition's approach, there was insufficient certainty for this project to be considered for funding within the bill. Thus, the contaminated sediment remains.

Let me conclude by saying once again how appreciative we are of this committee's efforts to refine this Natural Resource Damage section of Superfund. Since this second wave of liability has such long-range potential for damage expense, which is added on top of the expense of clean-up, the fine-tuning is essential.

The cost-effective and cost-reasonable provisions go a long way toward clarifying how appropriate restoration is to take place, and we urge your consideration of joining these in some nexus which ensures that the costs do not outweigh the benefits when an accelerated program of clean-up or restoration becomes the most desirable goal.

Thank you for the opportunity today of outlining a real case scenario faced by a responsible corporate citizen which has pledged itself to environmental stewardship and has found itself confronted by the existing language of CERCLA and many equally important issues.

While we as part of the Fox River Coalition have made substantial progress toward outlining a strategy for clean-up, the remediation process involves technical, political and financial issues. Clean-up technologies on a system-wide basis are in their infancy, sediment disposal and treatment costs are high, and the public support, regulatory, and administrative needs are complex.

We believe the Coalition and the Wisconsin Department of Natural Resources are addressing all these issues in the Lower Fox River. Your efforts today and as you complete the work on this important piece of legislation will determine how successful this demonstration project will be and how easily its success will be able to be duplicated at other sites around the country.

Public/private partnerships of this type are indeed rare, as Governor Thompson stated. With your help perhaps they'll become frequent, successful and able to be replicated—to the benefit of the environment and to us all.

Mr. OXLEY. Thank you, Ms. Foster.

Mr. Hall, in your written testimony you stated that H.R. 2500 would transfer all of the costs of restoring natural resources from the polluter to the taxpayer. Is that correct?

Mr. HALL. Mr. Chairman, that would be the case in some cases where we would be limited in our ability to recover the cost of restoring these facilities and have no other recourse except to shift that burden over to the taxpayers.

Mr. OXLEY. I know you went on to state that in many cases the polluter will no longer pay for restoration. Under our legislation, the polluter will not be getting off the hook. At every site where

an NRD claim is discovered, the responsible parties will be required to pay up to $50 million in restoration costs. According to information provided by your office, the general size of claims is far less than $50 million and the legislation, H.R. 2500, does not prevent the natural resource from being restored, as your testimony proposes.

Is there a difference of factual commitment here or a difference of opinion?

Mr. HALL. No, I think, Mr. Chairman, you are correct, there are very few cases where the cost of the restoration would exceed $50 million. But in those cases where it does exceed $50 million, it exceeds it by a substantial amount. You have a case with Bunker Hill in Idaho where the cost might be $1 billion. We have a case off the coast of southern California where the cost would run about $500- to $650 million. The case on the Hudson River with $100 million.

In those cases where the cost is substantial and which the damage to natural resources is massive, and it sometimes spreads over hundreds of square miles, we need to have the ability to have the party that is responsible bear the cost and not the taxpayers.

Mr. OXLEY. That money would come from the trust after the first $50 million; isn't that correct? The trust fund? Under the legislation, that is where it comes from.

Mr. HALL. Mr. Chairman, I do not believe that it is borne by the trust fund at this point.

Mr. OXLEY. That is very clear in our legislation that it does in fact come from the trust fund. That was our—not currently, but under our legislation.

Let me ask Mr. McHugh, in your testimony you state that H.R. 2500 will still enable trustees to continue to provide a level of primary restoration for injuries to natural resources. Does this mean that the elimination of nonuse damages does not jeopardize the primary restoration of injured natural resources?

Mr. MCHUGH. That is a good question. Yes, we are able to do primary restoration under this particular bill. However, we do have some limitations that have been imposed on us and one of them obviously has been the elimination of nonuse values.

In New Jersey, we have not had the opportunity to or have pursued nonuse values but I know that nonuse values are being pursued in other States throughout the country. So, yes, that would possibly limit the primary restoration of natural resource damages, if a nonuse value is a significant part of that claim in a State claim across the country. But from New Jersey's perspective, we still are able to undertake a degree of primary restoration.

Mr. OXLEY. Mr. McKnight, you heard my question to Mr. McHugh. Do you have any comments regarding that issue?

Mr. MCKNIGHT. Mr. Chairman, I am very confused because nonuse values have absolutely nothing at all to do with restoration. They are absolutely over and above the costs of restoration and I certainly applaud title IV for finally eliminating nonuse values which are just clearly an anathema; they don't make any sense at all.

So I am confused because I don't understand how nonuse values compute in any way in the restoration scenario.

Mr. OXLEY. Thank you.

Ms. Foster, in your statement you state, "We believe the 180-day rule to designate a lead trustee to be an important addition to this legislation." How would a designated lead trustee have improved the NRDA process at Fox River?

Ms. FOSTER. This coalition had been going on for 2 years and Fish and Wildlife had been sitting with the coalition in its deliberations and offering technical assistance but they, at no point, bought into the whole process of the coalition's goals in terms of what they were trying to accomplish on a voluntary basis and there have been, as you can see, a number of things that have already been accomplished and when they decided after 2 years to come in and ask for an NRD assessment, everything basically came to quite a halt and I believe had they been essentially been in the process to a fuller degree sooner, I believe we would either have known we would have to go ahead with the natural resources assessment at that point or they would have become part of the coalition and they would have been part of the solution.

Mr. OXLEY. The Chair's time has expired. The gentlelady from Oregon?

Ms. FURSE. Thank you, Mr. Chairman.

Mr. McKnight, last time you were here, I asked you how imposing a $50 million cap on natural resources damages would affect cleanup at our largest NRD sites. I asked you how much the cost of cleanup would be shifted to the American taxpayer. Now, at that time, you couldn't come up with an answer so I would like to reask the question and I would like to look at Lavaca Bay, Texas.

Alcoa is the leading PRP there. First, what is the estimated cost of natural resource restoration at Lavaca Bay?

Mr. MCKNIGHT. We don't know. At this point in time, the trustees have not developed any sort of a plan. But I want to back up just a moment because I certainly can answer the question with respect to cleanup.

The costs associated with cleanup of a site are absolutely and totally uncapped. The cleanup side of the program has no restrictions on the amount of dollars that must be spent and under the program, for the program——

Ms. FURSE. I asked about the natural resource restoration cost and I understand, Mr. McKnight, from NOAA that there has been a value placed on the NRD restoration at about $250 million. Now, in your view, how much of the contamination and natural resources damages do you estimate that Alcoa is responsible for. You can just give me a ballpark estimate at that site.

Mr. MCKNIGHT. First of all, I would like to ask for the record that NOAA submit the documentation associated with that specific claim because I have never seen any claim from NOAA that would allocate any responsibility to natural resources in that dollar range.

Second——

Ms. FURSE. In your view, how much is Alcoa responsible for at Lavaca?

Mr. MCKNIGHT. The problem is that we have not even gone through the process at Lavaca Bay yet of determining whether or not there are any injuries to natural resources and what has to happen in the process is you have to determine whether or not there are injuries, next you have to determine and quantify what

those injuries are and then you would go into the process of planning for restoration to restore, reestablish the services associated with those injuries.

Ms. FURSE. Thank you.

Mr. MCKNIGHT. And we are working with NOAA.

Ms. FURSE. Would you say that your company, should this be done, this estimation, would Alcoa be the primary company involved in the damages?

Mr. MCKNIGHT. Currently at Lavaca Bay, we are the only named PRP at the site. EPA has not named any additional PRP's. But I would like to say that we are currently working with NOAA and other trustees in that site and attempting to work the natural resource damage case.

Ms. FURSE. Good.

Now, should NOAA's number of $250 million be a ballpark figure and should you have say a 90 percent damage claim here, who do you think will pay the other part beyond the $50 million? Who do you think will pay for the cleanup if you have a cap of $50 million?

Mr. MCKNIGHT. Frankly, being very, very close to that case and having, for many years worked on that case, I find it very difficult to believe at the end of the process that we are going to determine that the cost of natural resource damages at that site exceeds $50 million.

Ms. FURSE. Mr. Hall, do you have a view of what the price of that site might be?

Mr. MCKNIGHT. Again, we haven't gone through the process. So it is impossible at this stage to be able to determine what the natural resource damages, if any, are at the site.

Ms. FURSE. Thank you.

Mr. HALL. Let me just clarify, the cost estimate that was provided in response to a question from the congresswoman is it would be as high as $250 million without any source control, so that assumes there would still be contamination occurring. So I think it would be substantially less than that under the likely scenarios under which remedial action is taken.

So I just want, in terms of clarification of that number, I think Mr. McKnight is right in terms of the specific costs associated with natural resource damage.

Ms. FURSE. Could I ask you, Mr. Hall, it is my understanding that as the budget has now been set for EPA at $1 billion, that there will not be in my view, from the testimony we heard here, and I would like to have your response, that there won't be very much money left in this trust fund if $1 billion is going to be the entire budget of EPA.

What is your feeling about how much there will be in the trust fund?

Mr. HALL. Well, you can look at the cases that we have, that we have identified and the liability is so substantial that it would far exceed the amount in the trust fund. There is a limit for each individual case of $50 million over and above whatever the liability—in response to the chairman, I was clarifying that point. So I think you would see the claims be substantially more than the amount in the trust fund.

Ms. FURSE. Mr. Chairman, I would yield. If you have a second round, I would like to ask another question but thank you.

Mr. OXLEY. The gentleman from Michigan.

Mr. DINGELL. How might the "cost reasonable" terminology of H.R. 2500 result in loss of natural resources?

Mr. HALL. Congressman, this is something that is difficult to determine at this point because the definition of those terms, they are not well defined and it puts us in a situation of requiring additional studies to be performed beyond the ones currently necessary to calculate the damages. That is going to increase the transaction cost. It will also require a whole series of studies to be performed, one for each increment to restoration alternative dramatically increasing the complexity and the cost of these studies.

Mr. McKnight talked about nonuse values and in terms of trying to talk about cost reasonable and putting some values, it is moving us in the wrong direction; it is moving us in the direction of having to monitize the value of these resources when we are trying to move in the other direction and concentrate on restoration. So I think this is a serious impediment to our efforts.

Mr. DINGELL. The provisions of H.R. 2500 require that restoration of only ecologically significant functions; is that right?

Mr. HALL. Yes.

Mr. DINGELL. And they prohibit the actual restoration of natural resources injured by hazardous materials, unless they are a significant functional ecosystem; is that right?

Mr. HALL. Yes.

Mr. DINGELL. So if an aquifer upon which a town was dependent were to be contaminated by a Superfund site, it would not be required to restore that aquifer; is that right?

Mr. HALL. I think it is certainly not clear that it would be, Congressman.

Mr. DINGELL. And the damages that would be associated with that would be capped at $50 million; is that right?

Mr. HALL. Yes, and then the $50 million additional from the trust fund.

Mr. DINGELL. Mr. McKnight, what is a measurable function? What is an ecologically significant function and where is it defined in the bill?

Mr. MCKNIGHT. Mr. Congressman, it is currently not defined in the bill. My understanding would be that——

Mr. DINGELL. Well, how am I then to know what these terms mean?

Mr. MCKNIGHT. My understanding is that that would be something that would have to be defined in the regulations and it is certainly appropriate——

Mr. DINGELL. Defined in the regulations. How is the regulator going to know what to put in the regulations to define these terms?

Mr. MCKNIGHT. Mr. Congressman, the area of ecology, there is a tremendous amount of knowledge with respect to ecosystems——

Mr. DINGELL. We are not talking about that and you know it. We are talking about how are they going to define this term? They are not just going to reach out into the broad body of knowledge and come up with a judgment. What is an ecologically significant function?

Mr. MCKNIGHT. Mr. Dingell, my simple definition of it is those are simple functions that are important to the public.

Mr. DINGELL. What does that mean?

Mr. MCKNIGHT. Who is the public? That is us.

Mr. DINGELL. You shut down an aquifer under a town that it is dependent on in New Mexico where Mr. deSaillan comes from, is that ecologically significant?

Mr. MCKNIGHT. With respect to that aquifer, sir, first of all, the cleanup side of the program addresses that aquifer and it should address that aquifer. Second, if there is any restoration that is required after the cleanup program comes in and abates any current risks to human health and the environment associated with that aquifer, $50 million will be applied on the restoration side to restore that aquifer and certainly if the aquifer provides drinking water sources to a community, it is a significant ecosystem.

Mr. DINGELL. Let's take the Oglala. It starts near the Canadian border and runs clear to the Mexican border. Somebody pollutes it very heavily. Is that an ecologically significant function?

Mr. MCKNIGHT. In the scenario that you spun, I am not familiar with that, but certainly it would be difficult to imagine that some contamination would affect the whole area from the Canadian border to the Mexican border.

Mr. DINGELL. Let's talk about the cap. A major part of the Oglala is contaminated and a lot of people are hurt. Water supplies for municipalities and irrigation is terminated. You are going to cap that at $50 million?

Mr. MCKNIGHT. First of all, I want to go back again, remediation is uncapped. The cleanup side of the Superfund program has absolutely no caps and we are required to address issues affecting human health and the environment. Including any potential risks to human health and the environment under the cleanup side of the program.

What we are talking about in terms of restoration is what comes after all those things have been addressed, after EPA is satisfied that we have in fact addressed those risks.

Mr. DINGELL. I know my time is running out, Mr. Chairman. Let's take a marsh——

Mr. OXLEY. Your time has run out but we will let you have a few more——

Mr. DINGELL. Could I have 1 minute more, Mr. Chairman?

Mr. OXLEY. Very good.

Mr. DINGELL. Let's take a marsh in northern California, it is a big sump. Somebody pollutes it. Can't very well restore a sump, a natural sump, because once it is in there it is in there for good. Now, all the migratory birds that have been using that area are going to be poisoned when they use it.

First of all, you can't remediate it and you are killing birds left and right. Are you going to help to get a new area set aside, a refuge to perhaps provide a replacement for the habitat of the ducks?

Mr. MCKNIGHT. It is a very good example, Mr. Dingell and I will tell you what happens in that scenario. First of all, the remediation side of the program addresses the current risks to the environment and in that situation——

Mr. DINGELL. You've got a sump that you can't——

Mr. MCKNIGHT. Well, okay, in that situation what you cannot do under the cleanup side is you cannot restore that resource to what it was before. But you can, in fact, cap that resource.

Mr. DINGELL. You filled it full of selenium.

Mr. MCKNIGHT. Well, let's assume you capped that resource and under the cleanup side of the program, the remedy that is selected by EPA is a cap remedy.

Mr. DINGELL. You cap that and the marsh is gone. Now, what are we going to do about the ducks?

Mr. MCKNIGHT. The question is how do you restore the resource. So you have to restore a resource for migratory birds. The definition of restoration under the bill is restore, replace or acquire the equivalent of the resource. I would suggest in that scenario if you cannot restore the resource that in fact you might very cost reasonably go out and acquire equivalent resources that those migratory birds can use. So you have got both sides of the program——

Mr. DINGELL. Would that be barred by the language of the legislation?

Mr. MCKNIGHT. No, it wouldn't be barred. The legislation defines restoration as restore, replace or acquire the equivalent. But that is a perfect example of how both sides of the program work together effectively.

Mr. DINGELL. Let me ask Mr. Hall and Mr. deSaillan, do you agree with that, gentlemen?

Mr. HALL. Congressman Dingell, I think the concern we would have is what is ecologically significant and what is the value to the public. Trying to argue that out for years in court and then coming up with a dollar amount——

Mr. DINGELL. You think that would fail on the grounds that it was not valuable to the public?

Mr. HALL. You would be arguing about it, it would be unclear. So the terms are so poorly defined that you wouldn't know and I think that is really the question.

Mr. DINGELL. I only have a minute here, Mr. deSaillan.

Mr. DESAILLAN. I guess one of the problems that I would have with what Mr. McKnight is saying is that the cleanup side of the program isn't always there. In New Mexico, we have approximately 60 sites where we have potential claims for natural resource damages. Only 13 sites in New Mexico are on the National Priorities List. We have no State Superfund law, we have no way of getting these sites cleaned up, of getting the groundwater at these facilities taken care of.

Under this bill, as I read it, groundwater is very likely not going to be considered as ecologically significant. If you look at the definition of ecology or ecosystem in the dictionary, it relates primarily to how organisms interrelate with the environment and an aquifer, unless it is a shallow aquifer that feeds into a wetland or feeds into a stream is not—at least arguably doesn't meet the definition of an ecosystem so I think we have a lot of problems here in trying to implement this program under some of the provisions that are in this bill.

Mr. DINGELL. Thank you. I have used more time than I should have. Thank you, Mr. Chairman.

Mr. OXLEY. The gentleman's time has expired and Mr. Crapo was hoping to get back to ask some questions but was unavoidably detained. The Chair would reiterate the comment that written questions could be submitted to the panel by any of the members present or not present, for that matter under the rules of the committee.

We thank all of you for your excellent testimony and your patience in bringing up the rear in the last panel. We particularly appreciate your testimony.

Thank you very much and the hearing is adjourned.

[Whereupon, at 5 p.m., the hearing was adjourned.]

[The following material was received for the record:]

NATIONAL MINING ASSOCIATION,
Washington, DC, November 8, 1995.

HON. MICHAEL G. OXLEY
Chairman, Subcommittee on Commerce, Trade, and Hazardous Materials, House of Representatives
Washington, DC

DEAR CHAIRMAN OXLEY: The National Mining Association (NMA) wishes to express to you the support of NMA and its members for the remedy selection provisions contained in Title I of H.R. 2500, the "Reform of Superfund Act of 1995". We believe that the bill's provisions take a considerable step forward in resolving some of the most troublesome aspects of the Superfund program over the last 15 years. We would appreciate it if you would enter this letter of support into the record of your Subcommittee's current Superfund reauthorization hearings.

The National Mining Association (NMA) is the industry association resulting from the merger of the National Coal Association (NCA) and the American Mining Congress (AMC). NMA comprises the producers of most of the nation's coal, metals, industrial and agricultural minerals; the manufacturers of mining and mineral processing machinery, equipment and supplies; and the engineering and consulting firms, financial institutions and other firms serving the mining industry.

Mining sites differ from other kinds of sites, thus posing different kinds of cleanup problems. The high volume and relatively low toxicity of mining wastes, plus the low bioavailability of metal compounds in mining wastes or soils, make it essential that remedy selection at mining sites be site-specific. The uniform, generic national approach to remedy selection and cleanup is too rigid, too costly and, too frequently, less effective. Selection of cleanup remedies should be based on actual, measurable risks to public health and the environment, not on predetermined "policy goals" that increase costs without corresponding benefits to health or environment.

H.R. 2500 takes the proper path by eliminating cleanup requirements based on "applicable, relevant and appropriate requirements" ("ARARs"). The bill is also correct in eliminating the current system's preference for "treatment" over other remedial approaches that, given a site-specific risk assessment and consideration of the site's characteristics, are far more likely to result in cost-effective cleanup. The bill's emphasis on dealing with "realistic and significant risks" through the use of "cost-effective and cost-reasonable" remedies is a welcome change.

With regard to the risk assessment "guidelines" in proposed Section 127(b), H.R.2500 quite rightly calls for independent and external peer review, as well as notice and opportunity for comment on the draft guidelines. NMA and its members suggest, however, that cost-effective and cost-reasonable cleanups, addressing realistic and significant risks, would be more likely to occur if the "guidelines" were actually regulations. Lead agencies may, for whatever reasons, ignore guidelines even though a sound foundation is present. As a consequence, putting those guidelines in the form of regulations would make lead agencies more accountable under the law.

Overall, however, Title I of H.R. 2500 represents a substantial improvement over the current, cumbersome, costly and ineffective approach to risk assessment and remedy selection. This industry has long supported site-specific risk assessment and remedy selection. NMA and its member companies welcome the inclusion of these principles in H.R. 2500, and are glad to express our support for these provisions. We thank you for your leadership, and stand ready to assist you and your staff as Superfund Reauthorization proceeds through the Congress.

22-583 O - 96 - 12

Thank you for your consideration of our views.
Sincerely,

RICHARD L. LAWSON.

PREPARED STATEMENT OF MICHAEL J. FARROW, DIRECTOR, DEPARTMENT OF NATURAL RESOURCES, CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION

I. INTRODUCTION

Good afternoon Mr. Chairman and members of the Subcommittee. My name is Michael Farrow. I am the Director of the Department of Natural Resources for the Confederated Tribes of the Umatilla Indian Reservation. The Umatilla Tribes occupy a 160,000 acre reservation in Northeastern Oregon. When our ancestors negotiated their treaty with the United States, they ceded 6.4 million acres to the United States, and agreed to live on the Umatilla Indian Reservation. Our treaty reserved some of our rights in those ceded lands, however, including the right to fish, hunt and gather plants in our traditional areas, whether or not they are on the Umatilla Indian Reservation. Although the United States has broken many of its promises made in the treaty, these treaty rights have been consistently recognized by all branches of the United States government. They form the basis of our subsistence economic activity today, and the Umatilla Tribes' governmental interest in natural resources located in much of eastern Oregon and Washington.

Because of our mutual, overlapping interest in natural resources, the Umatilla Tribes have developed close, cooperative working relationships with other governments in the region. Through a cooperative agreement with the local county, the Umatilla Tribes perform all the zoning activity for our resorvation. We have an excellent working relationship with the States of Oregon and Washington, reflected, in part by a cooperative agreement between the Tribes and the Oregon Department of Energy. My staff works on a daily basis with representatives of federal agencies such as the Bureau of Land Management, Bureau of Reclamation, Forest Service, Bonneville Power Administration and Department of Energy's Hanford Site. The Umatilla Tribes have entered into memorandums of understanding with cities, counties and other governmental units in Northeast Oregon and Southeast Washington. Tribal staff are a valuable scientific and technical resource for local governments in the region.

The Umatilla Tribes' Department of Natural Resources is the largest of seven departments in our tribal government. I supervise the work of six programs with a combined staff of 45 people. The Department's programs are: Fisheries, Wildlife, Water Resources, Cultural Resources, Environmental Rights Protection and Environmental Cleanup. I have directed this Department for 15 years. In this capacity I (and the Umatilla Tribes) have gained considerable experience with the federal Superfund statute. Our lands have suffered hazardous substance releases (and near releases) from commercial transportation. In addition, the Umatilla Indian Reservation is located downwind and downriver from the U.S. Department of Energy's Hanford Nuclear Resorvation. We are also located downwind of the U.S. Department of Defense's Umatilla Army Weapons Depot, where 12% of the nation's stockpile of nerve gas is stored.

Too much has already been said over the past months about how the current Superfund program "does not work." I plan to tell you today about the ways the current program does work, and how H.R. 2500, the Superfund reauthorization bill proposed by Chairman Mike Oxley would make it work much worse. I will also suggest some ways in which the current Superfund statute could be improved, addressing problems with the statute that are ignored by the H.R. 2500.

Let me start with a story from my home. Last June, a Union Pacific train derailed along the Snake River, in southeast Washington state. The derailment left a train car containing 13,000 gallons of sodium hydroxide half submerged in the river. This was a crisis for the Umatilla Tribes. The accident occurred at the time of year when millions of juvenile salmon from some of our most important salmon stocks are migrating through that stretch of the river. If the tank car breached, it could kill virtually everything in the huge reservoir behind Lower Monumental Dam, including millions of salmon.

The Umatilla Tribes immediately sent two staff to the site of the wreck, where they observed Union Pacific staff working to keep the tank from breaching and to get the tank out of the water. The Union Pacific spared no expense responding to this accident. By the time our people arrived, the Union Pacific already had more than thirty people at work. In less than 24 hours the UP had deployod and were using a large amount of heavy machinery, including a crane that came disassembled

on five tractor-trailer trucks. Working all night, all day, and into the next night, the Union Pacific did everything it could (once the accident had occurred) to get that tank out of the water without breaching—and they succeeded.

None of this would have happened if we did not have a strong Superfund statute on the books today.

Because we have a strong Superfund law, hazardous waste shippers like the Union Pacific have a powerful economic motivation to prevent these sorts of disasters. Without it, they would not. Companies cannot afford to do "good deeds" without being forced to by law. If they did, their competitors, who are not so good, would drive them out of business.

Before we had a strong Superfund, companies like UP did not respond this way to hazardous substance releases. Without a strong Superfund law, they will not respond this way in the future. The Superfund law kept a disaster from happening that day for the Snake River, the salmon, the Umatilla Tribes, and all people who use and care about these natural resources.

Unfortunately, H.R. 2500 would seriously weaken the Superfund statute.

II. H.R. 2500 IS DEEPLY FLAWED

Indian tribes have unique rights, interests and resources that no other government can protect. The current Superfund statute recognizes that fact and provides mechanisms for tribes to protect those interests. This is simple justice—justice for the people who are hurt by these releases.

H.R. 2500 would make it impossible for tribes to protect their members' health, the availability of the tribes' natural resources, or the free exercise of tribal religion and culture, from the injuries inflicted by hazardous substance releases.

Each section of H.R. 2500 contains provisions that will make the Superfund program work worse—for all governments—than the current system. Aside from being inefficient, many of these new provisions are fundamentally unjust. For instance:

Title 1, the remedy selection section, institutes processes that guarantee that risks to Tribal members' health will not be considered in the remedy selection process. American Indians' uses of natural resources, our unique exposure pathways, present problems that are too complex for risk assessment and cost/benefit analysis techniques to address. One example: The population of the Umatilla tribes, like most tribes, is too small to be "statistically valid" for risk assessment purposes. So our health impacts are completely ignored by the process! Under H.R. 2500, the "protection of human health" will not include the health of my family, my community.

The 50 percent repeal of retroactive liability contained within Title 2 is a corporate welfare program, plain and simple. It rewards large multi-national corporations—corporations already more powerful than governments such as mine—for poisoning our land and our people.

The Umatilla Tribes are proud of their good working relationship with the State of Oregon. This relationship is based on a pragmatic approach to problem solving and mutual intergovernmental respect. Nevertheless, H.R. 2500 favors the rights of states to such a degree that it impairs the legitimate rights of tribes and the federal government. The bill would make it impossible for sovereign tribal governments to protect their members or resources. The result is that the health of tribal members and the well-being of their resources and communities would not be protected, by any government. H.R. 2500's bias for state governments appears throughout the bill, not only in Title 5 (entitled, "State Role"), but also Title 6 ("Federal Facilities"), Title 4 ("Natural Rosource Damages") and most other titles of the bill. The Umatilla Tribes recognize the need for state governments to have more control over Superfund decisions made within their jurisdictions, but this bill goes too far, cutting Indian people off from protection and insulting tribal governmental rights.

The forgoing list of concerns just scratches the surface of the problems the Umatilla Tribes see in H.R. 2500 as a whole. Our concerns are shared by many other tribes as well, including the Coeur d' Alene Tribe, the Confederated Salish and Kootenai Tribes of the Flathead Reservation, and other Pacific Northwest tribes with whom we have been consulting concerning this legislation. Indeed, the National Congress of the American Indian, the nation's oldest and largest inter-tribal organization (with a membership of over 300 tribes) has passed two resolutions which reflect many of the concerns I will address in my testimony today. I would be happy to respond to questions regarding these concerns now at a later hearing, or in whatever way most serves your needs.

III. THE NATURAL RESOURCE DAMAGE PROVISIONS OF H.R. 2500 PLACE TRIBAL COMMUNITIES, CULTURE AND RESOURCES IN DANGER

As we all know, however, the purpose of this hearing is to address the Natural Resource Damage provisions of H.R. 2500, Title 4. The Umatilla Tribes, as well as other tribes we have been consulting with, are greatly troubled by several provisions of H.R. 2500's Natural Resource Damage provisions.

Indian people use natural resources in a host of ways that no other people do. Wild plants, game and fish form the foundation of our diet. Our physical culture—arts, musical instruments, etc., are made from natural resources harvested by tribal members. A tribal member's duties to the community are essentially defined by distribution of natural resources.

Who gathers plants for whom, who hunts or fishes for whom, at what ages, defines the rights of passage and the exchanges of duties that tie our community together—as it has from time immemorial. This use of natural resources is subsistence economics, but it is more. This use is community identity, but it is more. It is our form of taxation, but it is more. It defines what it means to be a child or adult or old person, a man or woman. It defines what it means to be a good person. It is our version of "the social compact." It is our traditional law—and it forms the basis of traditional religion. It is a vital and centraliziitg force on our reservation.

H.R. 2500 would place all of this in jeopardy.

H.R. 2500 effectively repeals Natural Resource Trustee status for Indian tribes. This ignores the fact that Indian people, Indian economy, Indian culture and Indian religion are far more dependent upon the use and existence of natural resources than any other population group in the United States. This repeal is also offensive from the standpoint of tribes' legal interests in those resources, tribal sovereignty, and longstanding federal policy promoting tribal self-sufficiency and self-government.

Let me highlight just a few crucial problems with H.R. 2500's Natural Resource Damage provisions.

A. It is unjust to cut off tribes' ability to recover for lost existence and bequest value

H.R. 2500 cuts off all recovery for so called "non-use" losses. It is more accurate to refer to these kinds of losses as loss of existence value and bequest value. These names describe what is actually lost—the knowledge that a resource exists and that it will be available to one's descendants. Indian communities have always been defined by use of certain resources in certain geographical locations in certain culturally distinct ways. Our natural resources, and how we use them, define who we are and how we live.

Consider the Umatilla Indian Reservation. The Umatilla River flows through the heart of our Reservation. Sixty percent of the reservation population is settled within a mile of its banks. We have a treaty-protected salmon fishery in this river, and the Umatilla Tribes have spent the past 15 years spearheading a multi-million dollar salmon restoration project in the Umatilla River. The main line of the Union Pacific Railway runs along the banks of this river. Forty trains a day carry a wide variety of products—including many hazardous substances—through the flood plain, and in some cases the very bed, of our river. A train wreck releasing hazardous substances along this section of track could kill the Umatilla River, making human use of it and human life along its banks impossible.

Even assuming that the river, in time, could be restored, and that the Umatilla Tribes could be compensated for our lost use of the river during remediation and restoration, that would not begin to compensate my people for the suffering they would have endured. The knowledge that the Umatilla River has been here, feeding, clothing and protecting my people from time immemorial is central to our understanding of the world and our place in it. The duty to pass it on to our children, and their children, is equally important. The bones of our ancestors have lain along the river for ten thousand years or more. Apart from our lost use of the river, the knowledge that the river has been so defined will cause serious suffering to my people and our neighbors.

Traditional Indian religion is not simply a matter of saying certain prayers or worshiping in a certain place. It is about a way of living in a particular landscape. We may have ceremonies at our Longhouse, but the whole landscape is our church, our sanctuary. Thus, natural resource injury does not simply mean that "so-and-so" has to fish someplace else next year. It means that our entire identity, our values, our religion have been injured. This is the significance to tribes of the existence and bequest value of natural resources. That is why it is essential that these tribal interests in natural resources be recognized and protected in this statute. By cutting

off any recovery for "nonuse values," section 107(f)(3)(C) of H.R. 2500 [Page 175, line 18.] would make it entirely impossible for my people to be recompensed for this loss.

B. The liability cap of $50 million is fundamentally unjust

Think about a train wreck along the Umatilla River a little more. What would be other impacts to the Umatilla Tribes from that train wreck? Will people living along the River have to be evacuated for a period of years? What about our tribal members' lost use of the river? And how much will it cost to restore the river? What about the non-Indian communities downstream who are also dependent upon the same resources?

Most Natural Resource Damage claims settle for comparatively small amounts of money, even considering the losses that have occurred. But when a release causes catastrophic injury, what is the justice in telling the injured people that they can only be compensated to a certain amount, far below their actual loss? All funds recovered in Natural Resource Damage actions have to be spent on restoring the injured resources. This money can't even be spent on other worthy goals such as improved schools or scholarships—it has to be spent on restoration. Misuse of the funds is, therefore, not an issue. The issue is simple justice. If the Union Pacific or a chemical manufacturer makes the Umatilla Indian Reservation unlivable, they should have to repair the harm they have done—all of it. There are no other Umatilla Indian Reservations out there that we could relocate to.

The current law already contains a cap of $50 million from a single release. This is unjust and would cut off liability in the "train wreck" situation I have just described, which, after all, would constitute a single release. This injustice in the current law must be removed. Instead of removing that injustice, H.R. 2500 extends the $50 million cap to the aggregate injury from all releases at a national priority list site. See H.R. 2500's new language for section 107(c)(4) [Page 171, line 12.]. Thus, even if multiple facilities made recurring releases that resulted in catastrophic injury to a tribe, the tribe would not be able to recover damages beyond $50 million. This is a new injustice added on to the one already present in the law. Neither "cap" is justified. Neither cap would heal the real injuries that Tribes are suffering and will suffer in the future.

C. H.R. 2500 could make it impossible for tribes to exercise any trustee rights.

1. *The "lead trustee" issue creates a legal morass and may cut off all tribal rights.*—Aside from the $50 million cut-off of liability, and the repeal of liability for lost existence and bequest values, H.R. 2500 contains a number of provisions that, depending upon judicial interpretation, could make it impossible for Tribes to exert their remaining trustee rights or otherwise protect their resources.

H.R. 2500 creates a new Section 301(c)(3) [Page 179, page 17.] that requires "the trustees" to designate a "lead trustee" when there is "more than 1 Federal or State trustee" interested in conducting an assessment for the site. This section does not attempt to define the powers of the "lead trustee" or clarify how the rights or interests of Tribal Natural Resource Trustees are affected by this section.

If this section would result in the lead trustee having unilateral decisionmaking authority over tribal resources—which will almost certainly be the case where the "lead trustee" and a tribe have concurrent interests in a resource—it is an unacceptable intrusion upon tribal rights. It is also fundamentally impractical. Tribal members' uses of natural resources are unique, and are only fully understood and represented by their own tribal governments. States and federal agencies cannot adequately represent these tribal interests. If the point of the Natural Resource Damage provisions of Superfund is to achieve justice for communities that have lost their uses of natural resources to a hazardous substance release, then tribes must be able to exert their full powers as trustees to accomplish this goal. Otherwise, tribal injuries will simply go unredressed. Moreover, since the beginning of this country, tribes have been recognized by the United States as sovereigns with the power to govern and protect their own resources and interests. To allow states or federal agencies to unilaterally impose Natural Resource Trustee decisions upon tribes would be a radical break with this time-honored policy.

Even worse, consider the impact of this provision on releases at federal facilities. In the case of releases at federal facilities, the lead federal Natural Resource Trustee, under current law, is often the same agency that released the pollution in the first place. Under this section, the polluter, such as the Department of Defense or the Department of Energy, could make all of the restoration decisions, and preclude the other trustees from exercising their rights. This is patently unjust. It is also dysfunctional—it increases the confusion, conflict and delays instead of reducing them. Instead of this provision, we suggest that Congress enact a provision that bars fed-

eral PRPs from asserting trusteeship rights and allows the other trustees for a site to exercise that authority instead.

2. *The "no double recovery" provision would cut off tribal rights and force a race to the courthouse.*—Section 107(f)(3)(D) [Page 175, line 21.] of H.R. 2500 bars "double recovery" for natural resource damages or costs. Although the bill does not explain the reason for this provision, this section implies that only one natural resource damage assessment can be performed for any particular release—despite the fact that a variety of resources of a number of trustees may be injured. Like the "lead trustee" provision, this provision will lead to inevitable conflicts and litigation. Like the "lead trustee" issue, this provision could lead to legitimate tribal claims for natural resource damages being cut off completely—simply because another trustee beat the tribe in a race to the courthouse. For that matter, a tribe could cut off state and federal claims in the same way.

This provision mandates legal chaos. This cannot be characterized as good public policy—unless the interests of polluters are more important than the public interest in good government. Moreover, it is unclear whether this provision might apply retroactively. That would result in a claim introduced by one trustee in, say 1990, being cut off because another trustee had introduced a claim for the same release in 1987. This is not justice.

D. H.R. 2500 unreasonably broadens the "irreversible and irretrievable commitment" exemption from NRD, in violation of long-established Federal policy toward indian tribes

Section 107(f)(3)(E) [Page 176, line 3.] of H.R. 2500 would broaden an exemption contained in the current law in ways that are procedurally unreasonable and would result in harm to tribal rights. Under Section 107(f)(3)(E)(i) [Page 176, line 7.] of H.R. 2500, a polluter could avoid a natural resource damage claim simply by showing that the natural resource injury was "irreversibly and irretrievably committed" in a record of decision (ROD). This is a new extension of this exemption. As a result, even when there is no notice of this potential "commitment," even when the draft and final versions of an EIS or comparable document have contained no discussion of this "commitment," the commitment can appear as a fiat in the record of decision. This means that this commitment—which cuts off substantial Natural Resource Trustee rights—could take place without any notice or consultation with the affected tribal or non-tribal trustee. This can hardly be just or sound policy.

Section 107(f)(3)(E) contains at least one other change from the current statute that directly harms tribes. Under current law, a polluter is exempted from natural resource liability if his release was authorized by a permit or license and the facility was operating in compliance with that license. See 42 U.S.C. § 107(f)(1). H.R. 2500 repeats that language in Section 107(f)(3)(E)(ii) [Page 176, line 13.]. But the current statute contains an important limitation on that exemption which H.R. 2500 deletes. Under the current statute, in the case of a federal permit or license, this exemption is only valid if the federal government's decision to issue the permit or license does not violate the federal trust responsibility to Indian tribes. See 42 U.S.C. § 107(f)(1). H.R. 2500 should place this language at the end of section 107(f)(3)(E)(ii). Instead H.R. 2500 omits this important limitation on this exemption. This omission could have very serious consequences. By deleting the reference to the federal trust responsibility to Indian tribes which is in the current statute, some would argue that H.R. 2500 purports to exempt federal agencies from their trust responsibility to Indian tribes in this setting.

If that is the intent of this bill, it represents a radical change in federal policy concerning Indians, conflicting with two centuries of judicial precedent and many decades of a federal policy which is embodied in many federal laws. Such a radical change in federal policy would require far more debate and analysis than has occurred to date. We would urge that as long as this bill contains this change in the law, then this bill should be reviewed by the House Subcommittee on Native American and Insular Affairs and the Senate Committee on Indian Affairs. This omission is a change that the Umatilla Tribes—and other tribes we are consulting with—vigorously oppose.

E. H.R. 2500 will result in increased injustice and transaction costs

Supporters of H.R. 2500 have discussed at length their perceived need to "reform" the Superfund statute to make it more "fair" (to polluters) and to reduce the delays, litigation and other transaction costs associated with the current statute. H.R. 2500 will achieve neither the goal of improved justice nor legal efficiency. As I have already demonstrated, the "reforms" designed to lighten the burdens on polluters—more often than not, large extremely wealthy corporations—are achieved at the expense of manifest injustice to some of the poorest and least protected people and

governments in the country—Indian tribes and their members. Within the bill's NRD provisions, "reforms" are proposed that simply cut off many legitimate bases for tribal claims. Moreover, procedural conflicts in the bill's NRD provisions will make it impossible for tribes to assert even those rights which they retain on paper. These results are simply unjust. We call upon Congress to reject H.R. 2500 on this basis.

Moreover, in pursuit of "reform," H.R. 2500 introduces new terms and processes which will require the drafting of new regulations and will inspire entirely new rounds of Superfund litigation. This will dramatically increase the delays, litigation and other transaction costs beyond what has already taken place. If the Superfund bill was a "Lawyers' Full Employment Act" before this bill, this bill will make it a "Lawyers' Social Security."

IV. THE UMATILLA TRIBES URGE THE COMMERCE COMMITTEE TO REJECT THE H.R. 2500 AMENDMENTS TO THE SUPERFUND STATUTE

H.R. 2500 is a dangerously flawed attempt to reform the Superfund statute. Not only will it fail to achieve its aims, but it will create a great deal of injustice is well. The Umatilla Tribes are aware that the National Congress of the American Indian (NCAI) one of the nation's oldest and most respected inter-tribal organizations, has adopted resolutions which not only highlight national Indian policy in regards to Superfund reauthorization, but also in regards to risk assessment legislation. Since many of the provisions of the various risk assessment bills have been incorporated into H.R. 2500, both the Superfund resolution and the Risk Assessment resolution are pertinent to H.R. 2500. I am including copies of these NCAI resolutions with this statement. I urge you to review, in particular, the Superfund resolution, which not only addresses problems with bills such as H.R. 2500, but also ways in which the current Superfund statute should be reformed in order to make it more effective.

Thank you for your consideration of these issues. I welcome your questions.

STATEMENT OF GAIASHKIBOS, PRESIDENT, NATIONAL CONGRESS OF AMERICAN INDIANS

INTRODUCTION

The National Congress of American Indians (NCAI) is the oldest, largest and most representative Indian organization in the nation. We would like to thank the Committee and the Confederated Tribes of the Umatilla Nation for this opportunity to submit written testimony in conjunction with the Umatilla Tribes. We endorse the indopth analysis of the draft bill by the Umatilla Tribes, and would like to briefly state our principal concerns with this legislation as it now stands.

Attached to this testimony are two reselutions approved by our member tribes in June of 1995. The first addresses proposed changes to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and the second addresses the effect of risk assessment provisions in laws such as CERCLA. I submit these resolutions for the record as they reflect the views of the nearly 200 Indian tribes who make up NCAI.

INDIAN TRIBES AND CERCLA IN GENERAL

Our member tribes have serious concerns about many of the changes to CERCLA proposed in H.R 2500. Indian tribes and tribal members suffer disproportionately from exposure to hazardous substances and have been rewarded with fewer of the advantages of industrial development. Tribal governments rely on CERCLA provisions to help them clean-up and restore their once-pristine reservations and are concerned about the following proposed changes:

- The liability cap of $50 million on natural resource damages;
- The trust responsibility limitation on the "permitted release" exception;
- The requirement of a "lead trustee" that will dilute the rights and interests of tribal governments;
- The elimination of "non-use" damages;
- The elimination of joint and several liability;
- The restrictions on retroactive liability; and,
- The use of risk assessment and cost/benefit analysis in remedy selection.

NATURAL RESOURCES DAMAGES CLAIMS

The proposals to limit the scope of natural resource damage claims should be re-examined. To date, tribes have had little success in obtaining funds from polluters for the restoration of natural resource damages. In fact, fears of "windfalls" according to tribes from NRD claims are not borne out by the facts. Current proposals would make it even more difficult for tribes to restore damaged natural resources. This is especially disturbing because tribes are accorded "trustee" status under the act and in bringing NRD claims they seek to restore natural resources at virtually no cost to the United States. Unless the NRD provisions are maintained, tribes' ability to defend their communities and remedy injuries to their cultural and natural resources will be seriously eroded.

In the mountain states in particular, huge waste sites have developed over the years and in the process have destroyed valuable natural resources. Because many Indian tribes have entered duly-ratified treaties with the United States, their members enjoy rights to use off-reservation lands for grazing, gathering, hunting and fishing. Tribes' ability to remedy polluted sites using NRD claims is necessary to exercise and enjoy meaningful treaty rights and is essential to their physical spiritual and cultural welfare.

DAMAGE ISSUES AND UNIQUE TRIBAL IMPACTS

Our tribes are also concerned with the proposal to restrict the amount and type of damages that are recoverable under CERCLA. The draft bill proposes to amend Section 107 of the act so that there can be no recovery except for direct, monetary losses from the lost use of a natural resource, eliminating all "non-use" damages. This change fails to take into account the true costs to tribal cultures from the loss of access to the natural features of the land and the natural resources that are found there. It does not include the damage from natural resource destruction that harms the traditional ways of Indian people.

THE TRUST RESPONSIBILITY LIMITATION ON THE "PERMITTED RELEASE" EXCEPTION

Under current law, a polluter is exempt from natural resource liability if the release was permitted or licensed and the polluter was operating in compliance with that license. However, there is an important limitation on that exemption. This exemption is only valid if the federal government's decision to issue the permit or license does not violate the federal trust responsibility to Indian tribes. See 42 U.S.C. § 107(f)(1). H.R. 2500 includes the "permitted release" exception, but omits the important limitation that protects the federal trust relationship that tribal governments have with the U.S. This change will have serious consequences. It will permit the federal agencies to once again allow pollution on Indian lands, and the tribes will have no recourse because of the "permitted release" exception. There is a long history of unfettered toxic release of Indian lands and this change in the law will undoubtedly encourage more of the same.

RESOLUTION SPK–95–012

TITLE: PROPOSED REFORMS TO CERCLA/SUPERFUND STATUTES

WHEREAS, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the welfare of the Indian people, do hereby establish and submit the following resolution; and

WHEREAS, the National Congress of American Indians (NCAI) is the oldest and largest national organization established in 1944 and comprised of representatives of and advocates for national, regional, and local Tribal concerns; and

WHEREAS, the health, safety, welfare, education, economic and employment opportunity, and preservation of cultural and natural resources are primary goals and objectives of NCAI; and

WHEREAS, Indian Country has been disproportionately used by polluters as a place to illegally dispose of hazardous substances; and

WHEREAS, Tribes, their reservations and communities are exposed to a host of risks from hazardous substance releases that most non-Indian communities do not

face, and Tribal governments are the only entities that can effectively protect reservation residents and Tribal resources from these risks, and

WHEREAS, polluting industries have made several proposals for major changes in the CERCLA/Superfund statute that would take away Tribes' ability to protect their communities and remedy outstanding injuries to Tribal members' health, culture, and natural resources; and

WHEREAS, the CERCLA/Superfund statute currently contains many procedural barriers that keep Tribes from being able to fully avail themselves of their rights under the statute and that do not reflect Congressional intent.

NOW THEREFORE BE IT RESOLVED, that Congress is hereby urged to protect and support the exercise of Tribal powers under the CERCLA/Superfund statute, the nation's primary law protecting human health and the environment from hazardous substance releases, and that Congress reject the polluters' proposals and preserve Tribes' ability to protect reservation residents and Tribal natural resources by retaining the following provisions of the CERCLA/Superfund statute:

1. Preserve Tribal standing to participate in CERCLA/Superfund actions.
2. Preserve Tribal standing to bring natural resource damage claims against potentially responsible parties under the NRD provisions of CERCLA.
3. Preserve retroactive liability of polluters for remediation of hazardous substance releases that occurred before 1980.
4. Retain liability of polluters for pre-1980 natural resource injuries, where the injuries continue into the present.
5. Retain strict, as well a joint and several liability for polluters.
6. Impose no new caps on polluters' liability for natural resource damages.
7. Preserve Tribes' ability to seek compensatory damages.
8. Preserve the liability of polluters for all lost natural resource values; and

BE IT FURTHER RESOLVED, that NCAI hereby urges Congress to adopt the following reforms, aimed at removing barriers and creating a more just process for Tribes under the CERCLA/Superfund statute:

Tribes should be able to fund their natural resource damage assessment activities from the Hazardous Substance Superfund. Such monies could later be repaid to the Fund once Tribes' claims have been resolved

2. Natural resource trustees' decisions should only be subject to judicial review, on an arbitrary and capricious standard, based upon an administrative record
3. A federal agency should not be allowed to be a natural resource trustee for a site where that agency is also a potentially responsible party.
4. Tribal trustees should be able to pool recoveries from multiple small damage assessments in order to fund more efficient regional restoration strategies.
5. Remove the current arbitrary cap on liability for natural resource damages.
6. Clarify that Tribal natural resource damage assessments qualify for the rebuttable presumption of CERCLA section I07(f)(2)(C).
7. Clarify that Tribes are generally treated as states for the purposes of the statute.

CERTIFICATION

The foregoing resolution was adopted at the 1995 Mid-Year Conference of the National Congress of American Indians, held at the Sheraton Spokane in Spokane, Washington, on June 6-8, 1995 with a quorum present.

GAIASHKIBOS,
President.

ATTEST:

S. Diane Kelley, Recording Secretary

Adopted by the General Assembly during the 1995 Mid-Year Conference of the National Congress of American Indians, held at the Sheraton Spokane in Spokane, Washington, on June 6-8, 1995.

RESOLUTION SPK–95–010

TITLE: OPPOSITION TO LEGISLATION AIMED AT RISK ASSESSMENT IN ENVIRONMENTAL LAW

WHEREAS, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States to enlighten the public toward a better understanding of the Indian poople,

to preserve Indian cultural values, and otherwise promote the welfare of the Indian poople, do hereby establish and submit the following resolution; and

WHEREAS, the National Congress of American Indians (NCAI) is the oldest and largest national organization established in 1944 and comprised of representatives of and advocates for national, regional, and local Tribal concerns; and

WHEREAS, the health, safety, welfare, education, economic and employment opportunity, and preservation of cultural and natural resources are primary goals and objectives of NCAI; and

WHEREAS, Indian poople are gravely concerned that powerful industrial commercial and political forces are preparing to sell out long-term ecosystem health and our future generations for the sake of short-term economic gain; and

WHEREAS, legislation which may have adverse impact on Tribal interests is sometimes enacted without Tribal consultation or knowledge; and

WHEREAS, Congress is currently considering several bills that would require onerous risk assessments and cost-benefit analyses before federal environmental protection regulations could be enacted or enforced; and

WHEREAS, the risk assessment methodologies now in use fail to recognize, protect, and understand sovereign Tribal governments and their communities, because those methodologies fail to take into account the unique traditional, cultural and spiritual life ways of American Indians; and because those methodologies are inherently incapable of analyzing sovereign Tribal governments and their communities; and

WHEREAS, cost-benefit analysis is inherently biased because regulation costs are usually easily quantified in economic terms, but many benefits, even when enormous, are hard to quantify economically and are usually undervalued; and

WHEREAS, the risk assessment and cost benefit analysis bills currently before Congress are not drafted in good faith, but are instead covert attempts to block the passage of any new environmental protection regulations and to prevent the enforcement of existing environmental protection regulations; and

WHEREAS, the existing environmental regulations, threatened by these bills, help to protect the health, natural resources and culture of American Indians from injuries and damages caused by short-sighted, self-interested economic decisions by private parties and federal facility managers.

NOW THEREFORE BE IT RESOLVED, that NCAI hereby urges the Congress and President of the United States to reject any bills brought before them that would require risk assessment or cost-benefit analysis as a condition for the enactment or enforcement of environmental protection regulations.

CERTIFICATION

The foregoing resolution was adopted at the 1995 Mid-Year Conference of the National Congress of American Indians, held at the Sheraton Spokane in Spokane, Washington, on June 6-8, 1995 with a quorum present.

GAIASHKIBOS,
President.

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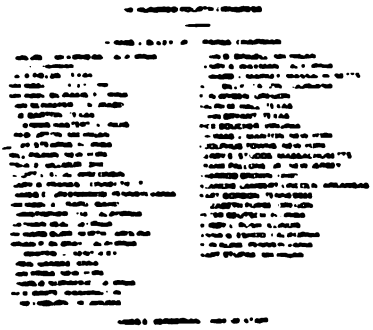


U.S. House of Representatives
Committee on Commerce
Room 2125, Rayburn House Office Building
Washington, DC 20515–6115

October 25, 1995

The Honorable Carol Browner
Administrator
U S. Environmental Protection Agency
401 M Street, S W
Washington, D C 20460

Dear Administrator Browner:

We are in receipt of the May 18, 1995, letter from Assistant Administrator Elliott Laws responding to requests made to you in our letter of March 30, 1995. These requests followed up on issues raised in the Subcommittee on Commerce, Trade, and Hazardous Materials Superfund hearing on March 16, 1995, and were directed at ascertaining the adequacy of EPA's scientific basis for its lead-in-soil removal policy for Superfund sites. In particular, we expressed our concern about this issue in connection with: (1) EPA's apparent preference for requiring soil removal down to artificially low levels, such as 500 to 1000 parts per million (ppm), as a Superfund cleanup remedy at sites involving lead-in-soils; and (2) EPA's continued reliance on the Integrated Exposure Uptake Biokinetic (IEUBK) model to justify its lead-in soil policy.

The Committee has been interested in EPA's lead-in-soil policy for years. It has questioned EPA about its policy at several Superfund hearings and in our March 30, 1995, letter. In each of these hearings, and in Mr. Laws' letter of May 18, 1995, EPA has defended its lead-in-soil policy, as well as its use of the IEUBK model.

EPA continues to base its lead-in-soil policy on the IEUBK model despite the fact that it admitted at the May 23, 1995, Subcommittee hearing that the latest version of the model (0 99d) has not been validated and, according to widespread reports, the model fails to accurately predict blood lead levels for those living at or near Superfund sites. Furthermore, despite the fact that EPA's July 14, 1994, soils guidance for Superfund and RCRA sites states that the IEUBK Model "allows the risk manager to consider site-specific information that can be very important in evaluating redemption options," EPA often runs the model using default values. It is our understanding that, if the current version of the model is run using all of the default values, soil removal down to approximately 400 ppm would be required even if the actual blood lead levels fail to show a basis for concern. This is in contrast to EPA's recommended level of 5,000 ppm as the level for soil abatement under its Section 403 guidance, even for areas where children are likely to be present.

As a result of EPA's lead-in-soil policy, costly soil removals are being required at Superfund sites throughout the country with little, if any, benefit to human health. For instance, at the West Dallas smelter site in Dallas, Texas, EPA provided extensive soil cleanup in a surrounding community. The ATSDR,

however, later found that after EPA's action "no relationship between blood lead levels and soil lead levels were observed" (summary of ATSDR evaluations of communities living near lead-contaminated sites, May 16, 1995, ATSDR).

The Committee has obtained an EPA memorandum from Larry G. Reed of the EPA's Hazardous Site Evaluation Division Office of Emergency and Remedial Response to Lynn Moos, Deputy Director, Chemical Management Division, Office of Pollution Prevention and Toxics, dated July 26, 1995, which raises questions concerning the adequacy of the IEUBK model and EPA's lead-in-soil policy (see attachment 1). According to this memorandum, EPA has contracted Abt Associates to prepare a draft economic analysis on lead in soils for which the IEUBK model was examined and criticized. The memorandum indicates a clear effort within the EPA to prevent this draft economic analysis from being reviewed by the Science Advisory Board, because a review would have "major policy, enforcement, and political implications for the Superfund program."

Specifically, the memorandum states:

> The Superfund program views the possible SAB review with the utmost concern because of the grave implications it could have for the Superfund program . . . There is little doubt that an SAB review could have serious consequences for Superfund reauthorization

Why shouldn't the SAB review this model? The Agency should not deny scientific information to Congress or the public.

The memorandum also states:

> [T]he IEUBK model for lead would inevitably be scrutinized by the economics panel ... [P]ortions of the draft report are flawed technically, and public review by a competent body of experts will be embarrassing to the Agency. Indeed, the draft reports have not resolved the scientific concerns raised by the OPPTS expert on the lead model. ...
>
> We caution that an SAB consultation or a review of the current document could lead to public confrontation between our two offices ... both programs would like to avoid.

Isn't an open process necessary, given the diminishing credibility of the Agency in the area of science? Recall that in a recent 1992 Report, "Safeguarding the Future: Credible Science, Credible Decisions", an EPA appointed panel of experts found a "climate and culture" within the Agency such that even Agency personnel perceived that EPA science was "adjusted to fit policy."

We are deeply concerned that EPA's existing lead-in-soil policy is without sound scientific basis. It could result in the wasted expenditure of millions of dollars, and place the U.S. Treasury at substantial risk in cost recovery actions. We are further concerned about the continuing efforts to restrict review from the SAB.

To aid in our continuing investigation of this matter, we request that EPA provide the Committee with the following documents:

(1) The Abt Associates draft report on lead

(2) All other internal and contractor documents, memoranda, and correspondence referring or relating to the Abt Associates draft report;

(3) All internal and contractor documents, reports, memoranda and correspondence prepared since January 1, 1986, which reviews EPA's lead-in-soil policy or the IEUBK model; and

(4) The integrated data underlying EPA's "Three City Lead Study," data dictionaries, and other guides to usage of the integrated data base.

We would appreciate a response to these requests by November 6, 1995. As you know, the Committee is currently considering Superfund reauthorization. Your responses will assist us as we determine how best to reform the program.

Sincerely,

Thomas J Bliley, Jr
Chairman
Committee on Commerce

Michael G Oxley
Chairman
Subcommittee on Commerce, Trade, and Hazardous Materials

Michael D Crapo
Member, Subcommittee on Commerce, Trade, and Hazardous Materials

Dan Schaefer
Chairman, Subcommittee on Energy and Power

Attachment

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUL 28 1989

OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE

note to: Lynn Moss, Deputy Director
Chemical Management Division
Office of Pollution Prevention and Toxics

Subject: Proposed Science Advisory Board Review of Draft Economic Analysis of Lead by Abt Associates

This note summarizes the concerns and recommendations we discussed at last week's meeting.

On July 12, 1989, managers and staff from our two offices and ORD staff met to discuss the Superfund program's concerns about the proposed Science Advisory Board (SAB) review of the draft Economic Analysis on lead prepared by Abt Associates. The Superfund program views the possible SAB review with the utmost concern because of the grave implications it could have for the Superfund program. Below are some of the concerns raised in the meeting and recommendations for their resolution.

1. The draft analysis performed by Abt relies on methodology that has already been reviewed by the SAB. The economics analysis in the draft Abt report uses the same methodology as that used for regulations for deleaded gasoline and for the National Ambient Air Quality Standards that were reviewed previously by the SAB. The draft Abt report updates some parameter values but apparently makes no other important changes to the methodology that the SAB has reviewed. A similar approach has been used in the Abt retrospective review for the Clean Air Act's Section 812A that is currently undergoing its review (by the Clean Air Act Compliance Advisory Council) that is coordinated by the SAB.

2. The potential SAB review has major policy, enforcement, and political implications for the Superfund program. Although the focus of the SAB review would be on the economic benefits of Title X rulemaking the IEUBK Model for Lead inevitably would be scrutinized by the economics panel because it is an integral part of the economics analysis. After receiving favorable reviews of the lead model from two other SAB panels, the Superfund and Solid Waste programs incorporated the lead model as the centerpiece of their guidance for determining cleanup levels for lead in soil and considering sources of lead other than soil in determining remedies for Superfund and RCRA corrective action sites.

There is little doubt that an SAB review would have serious consequences for Superfund reauthorization, an area that is receiving the Administrator's highest priority. The Superfund lead policy has been defended as recently as last month by the Assistant Administrator and Deputy Assistant Administrator of OSWER and other program officials before Congressional committees considering Superfund reauthorization. Those parties who are legally responsible for paying for cleanups at Superfund lead sites would utilize inappropriately any SAB review that included the lead model to renew before Congress their challenges to Superfund policy that they have already lost in Court.

Cost Benefit Analysis is a particularly sensitive area for Superfund for it is included in new Superfund legislation proposed by Congress. The Superfund program has emphasized within EPA and to other Federal Agencies that while we support exploring new approaches to the incorporation of cost benefit analyses into the decision-making process for hazardous waste sites, additional work is needed to reasonably quantify the benefits of reducing health and environmental risks, and it would be inappropriate to require cost benefit analyses as a condition

of site cleanup at this time. Premature SAB review of the Cost Benefit Analysis methodology in the draft Abt report could have severe consequences for the future of Superfund legislation and the ability of the Superfund program to clean up hazardous waste sites.

3. The draft report is not ready for SAB review. Certain provisions of the draft economic analyses for Section 403 and portions of the draft report for Section 402/404 seen by our program are flawed technically, and public review by a competent body of experts will be embarrassing to the Agency. Indeed, the draft reports have not resolved the scientific concerns raised by the OPPTS expert on the lead model. The IEUBK model has been inappropriately applied to estimates of pica, and bioavailability associated with ingestion of paint chips has been incorporated into the model. Yet EPA's own Guidance Manual, which was developed by OERR, OPPTS, and ORD, explicitly states that the model cannot be applied for the episodic exposures characteristic of pica and cautions that little is known about the bioavailability of paint. The draft Section 403 report also uses a flawed approach to develop national blood lead distributions, compare these distributions to NHANES III data, and claim that the lead model "overpredicts." The approach used in the draft report contradicts the Agency's lead model validation strategy that is being applied currently in validation exercises that are headed by an OPPTS scientist.

4. A review by SAB can take many months and is unlikely to meet the rulemaking schedule outlined by OPPTS at last week's meeting. Our program's experience has been that generally several months of intense preparation by EPA technical experts are required prior to an SAB review (after a product has been reviewed by other offices and finalized), another year or more is needed for review by the SAB panel members and development of an SAB report, and several more months of full-time work by several members of the program staff are necessary to respond to issues raised by the SAB. We know SAB is trying to speed up the process, but you should be concerned about the time frame for review and your action.

5. Fortunately, other better approaches are available that we believe would satisfy both offices. Among these are the following:

a. Some members of the Technical Review Workgroup for Lead have volunteered to work with OPPTS and its contractor to apply the IEUBK Model appropriately to estimate costs and benefits of lead in dust, soil, and paint nationally. An ORD statistician recommends an approach that would obtain estimates in a manner suitable for bottom-line estimates favored by OMB by determining the residual risk from lead in dust and soil and paint. If allocation among these individual components is needed, evaluation of subpopulations in the NHANES data base may possibly provide some basis for such estimates.

b. Internal and external peer review of the draft report could be conducted expeditiously so that OPPTS could determine strengths and weaknesses in the methodology. This approach is widely used by many program offices to provide the advantages of peer review in a timely fashion.

c. An SAB consultation rather than a review could be requested. The Superfund program considers this option risky and does NOT recommend it, because our past experience suggests that SAB committee members are rarely constrained by the scope or schedule requested by the program office. We caution that an SAB consultation or a review of the current document could lead to public confrontation between our two offices that both programs would like to avoid.

We look forward to working together so that the needs of both of our programs can be met.

Larry G. Reed
Hazardous Site Evaluation Division
Office of Emergency and Remedial Response

U.S. House of Representatives
Committee on Commerce
Room 2125, Rayburn House Office Building
Washington, DC 20515–6115

November 20, 1995

The Honorable Carol Browner, Administrator
United States Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Dear Ms. Browner:

Thank you for appearing at the Subcommittee on Commerce, Trade, and Hazardous Materials' hearing on H.R. 2500, the Reform of Superfund Act of 1995, on October 26, 1995. During your testimony, you indicated that you would submit a number of items for the record. Pursuant to the Chair's order at the hearing, the Subcommittee requests that you submit the following materials within five (5) legislative days in order to complete the hearing record:

1. Black and white, 8 1/2 x 11 copies of all charts used in your testimony.

2. A detailed list of sites where 1% of waste at a site is "not an insignificant amount of toxic waste." [See attached transcript page 71.]

3. Copies of letters from States voicing concerns regarding the provisions of H.R. 2500. [See attached transcript page 95.]

4. A list of Superfund activities that will not be occurring due to the reduced appropriations levels enacted by the Congress, in response to a question from Mr. Dingell. [See attached transcript pages 106-107.]

5. A list of sites in each Subcommittee Member's district which have been "removed from the master Superfund list." [See attached transcript page 129.]

6. A written response to Mr. Whitfield's question concerning EPA's position on the establishment of a direct spending mechanism to ensure those funds collected by the oil and chemical feedstocks excises taxes, and the corporate environmental income tax, are available to be spent on Superfund cleanups. [See attached transcript pages 131-132.]

7. In your testimony, and again in response to a question to Mr. Wyden, you indicated that EPA estimated the costs of H.R. 2500 to be in excess of $2 billion annually. You also showed a chart which indicated an estimated total annual cost of the Superfund program to be in excess of $2.6 billion annually. However, other estimates received by the Committee regarding the cost of the Superfund program under H.R. 2500 have been much lower. Please provide a detailed explanation of how you and your staff arrived at this figure and provide for the record all documents and other material relating to the methodology and assumptions used in this analysis.

8. In response to questions from Mr. Crapo, you discussed the draft ABT Associates report on EPA's lead-in-soils policy and the IEUBK lead model. A letter from the Committee, dated October 25, 1995, was also presented to you at this hearing with specific requests regarding the draft ABT Associates report and the Three Cities Lead study (see attached correspondence). Mr. Crapo specifically asked that a copy of the ABT Associates report be provided to which you agreed. [See attached transcript pages 75-79.]

   The October 25 letter requested that a response and all requested documents be submitted to the Committee no later than November 6, but to date, we have not received a response. Further, Committee staff have independently contacted EPA staff but have been unable to obtain a copy of the report. In light of EPA's failure to supply the requested materials, please submit the following to the Committee within five (5) legislative days:

   a. A copy of the draft ABT Associates report.

   b. All other information requests including documentation referred to in the Oct. 25 letter be provided immediately. For any request which cannot be met an explanation of why and at what date it will become available.

   c. A written update on when the EPA Science Advisory Board will review the ABT Associates report as you indicated in hearing testimony.

Again, please provide all of these materials within five (5) legislative days so that we may close the hearing record. If you have any questions, please contact Mr. Hugh Halpern of the Committee staff at 202/225-2927.

Thank you in advance for your prompt cooperation and assistance.

Sincerely,

Michael G. Oxley
Chairman
Subcommittee on Commerce, Trade, and
Hazardous Materials

Enclosures.

Attachment B

U.S. House of Representatives
Committee on Commerce
Room 2125, Rayburn House Office Building
Washington, DC 20515–6115

December 20, 1995

The Honorable Carol Browner
United States Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Dear Ms. Browner:

I am writing to follow-up my correspondence dated November 20, 1995, requesting your written response to several questions stemming from the Subcommittee on Commerce, Trade, and Hazardous Materials' October 26, 1995 hearing on H.R. 2500, the Reform of Superfund Act of 1995. In that letter, I requested that you respond to several questions and submit a number of materials for the record. As of this date, I have not yet received a response.

That letter requested that you provide the requested answers and materials within five (5) legislative days of the date of the original letter in order to facilitate the printing of the hearing record. That period expired on December 6, 1995.

Please provide the responses to these questions and requests forthwith. If you are unable to provide the requested information, please respond in writing no later than December 31, 1995 as to why you are unable to comply with the Subcommittee's request.

Thank you in advance for your cooperation and assistance.

Sincerely,

Michael G. Oxley
Chairman
Subcommittee on Commerce, Trade, and
Hazardous Materials

367

U.S. House of Representatives
Committee on Commerce
Room 2125, Rayburn House Office Building
Washington, DC 20515–6115

January 31, 1996

BY FAX

The Honorable Carol Browner
Administrator
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Dear Ms. Browner:

After you testified at the October 26, 1995 legislative hearing on H.R. 2500, the Reform of Superfund Act of 1995, you agreed to both submit materials and respond to questions for the record. On November 20, 1995, I sent you the attached letter (Attachment A) requesting you to submit certain materials and respond to certain questions for the record. That letter requested a response within five (5) legislative days in order to speed completion of the hearing record.

On December 20, 1995, two weeks after the initial deadline had passed, I wrote you asking you to respond to the November 20 correspondence or explain why you could not (Attachment B). To date, we have yet to receive a response to either of these letters.

Please provide the requested responses and materials no later than the close of business Thursday, February 8, 1996 or the hearing record will be closed and a notation made that EPA failed to respond to repeated requests for submission of these materials.

Thank you for your assistance and cooperation. If you have questions, please contact Mr. Hugh Halpern of the Committee staff at 202/225-2927.

Sincerely,

Michael G. Oxley
Chairman
Subcommittee on Commerce, Trade and
Hazardous Materials

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

Office of Congressional and
Legislative Affairs

February 7, 1996

Honorable Michael Oxley
Chairman, Subcommittee
on Commerce, Trade and Hazardous Materials
Committee on Commerce
U.S. House of Representatives
Rayburn House Office Building, ROOM 2125
Washington, D.C. 20515-6115

Dear Mr. Chairman:

This is in response to the questions posed by the Subcommitttee to Administrator Browner following the October 26, 1995 hearing on H.R. 2500.

Enclosed are the responses to questions 1 through 6. These responses were prepared by the EPA Office of Solid Waste and Emergency Response and the Office of Enforcement. The response to question 7 in undergoing interagency clearance and will be forwarded as soon as it becomes available. The response to question 8 was provided to you under separate cover dated November 28, 1995.

If there is any further information the Agency can provide to assist the Subcommittee, please contact Barbara Bassuener of my staff (Telephone 260-5435).

Sincerely,

Robert W. Hickmott
Associate Administrator

Enclosure

Responses to Questions following October 26, 1995 hearing
Subcommittee on Commerce, Trade and Hazardous Materials
House Committee on Commerce

Question 1 Black and white, copies of charts used in your testimony.

Response: See Attached.

Question 2. A detailed list of sites where 1% of waste at a site is "not an insignificant amount of toxic waste."

Response.

H.R. 2500's 1% DE MINIMIS EXEMPTIONS

H R 2500 would exempt all parties who contributed 1 percent or less of the waste at the site, and whose entire involvement at the site was prior to 1/1/87.

The chart below illustrates how this provision would apply at individual sites.

According to the provisions of H.R. 2500, "de minimis" PRPs at the sites below are subject to the new de minimis exemption under Sec. 107(n)(1).

1 Are any of the facilities owned by the United States? NO

2. Are each of these facilities on the NPL? YES

3. Is it true that "no activity of" the affected PRPs "occurred after January 1, 1987" as required by Sec. 107 (n)(1)(A)? YES

4. Is it true that "no activity of" the affected PRPs "resulted in the disposal or treatment of more than 1 percent of the volume of materials containing hazardous substances, as required by Sec. 107 (n)(1)(B)? YES

SITE EXAMPLES

Site Name	# of PRPs at or below 1%	% of total PRPs at or below 1%	Volumetric Equivalent to 1%
Bypass 601	3600	90%	3.4 million pounds
Arrowhead	286	55%	61,000 gal.
Caldwell Systems	282	44%	121,000 gal.
Commercial Oil	684	98%	519,000 gal.
Dixie Oil Process	17	57%	16,000 gal.
Fisher/Calo	267	92%	28,000 gal.
Palmetto Recycl.	10	36%	3,000 gal.
Tonolli	485	96%	1,000,000 gal.
Wayne Waste Oil	123	77%	68,000 gal.

Question 3 Copies of Letters from States voicing concerns regarding the provisions of H R 2500

Response See Attached

Question 4 A list of Superfund Activities that will not be occuring due to the reduced appropriations levels enacted by the Congress, in response to the question from Mr. Dingell

Response

Question 5 A list of sites in each Subcommittee Member's district which have been removed from the master Superfund list

Response See Attached.

Question 6 A written response to Mr. Whitfield's question concerning EPA's position on the establishment of a direct spending mechanism to ensure those funds collected by the oil and chemical feedstocks excise taxes, and the corporate environmental income tax, are availabe to be spent on Superfund cleanups.

Response The Administration's proposal and H R. 228 provided mandatory spending, or a direct spending mechanism to cover a specific item. That item, orphan shares is the liability attributed to parties that are financially non-viable. We do not support a direct spending mechanism for anythings beyond the orphan share.

Question 7 In your testimony, and again in response to a question to Mr. Wyden, you indicated that EPA estimated the costs of H R. 2500 to be in excess of $2 billion annually You also showed a chart which indicated an estimated total annual cost of the Superfund program to be in excess of $2.6 billion annually. However, other estimates received by the Committee regarding the cost of the Superfund program under H.R. 2500 have been much lower Please provide a detailed explanation of how you and your staff arrived at this figure and provide for the record all documents and other material relating to the methodology and assumptions used in this analysis.

Response. See attached.

Question 8 In response to questions from Mr. Crapo, you discussed the draft ABT Associates report on EPA's lead-in-soils policy and the IEUBK lead model. A letter from the Committee, dated October 25, 1995, was also presented to you at this hearing with specific requests regarding the draft ABT Associates report and the Three Cities Lead study. Mr Crapo specifically asked that a copy of the ABT Associates report be provided to which you agreed.

Response: A response was sent under separate cover November 28, 1995 and referenced the request for materials delivered on November 17th.

Superfund: Fundamentally Different Through Reforms

REFORMS I - *June 1993*

Reform	Impact
Streamline Process for Providing Relief to *De Minimis* Parties	Protected Over 11,000 *De Minimis* Parties Since Inception
Provide Protection to Even Smaller (*De Micromis*) Parties by Stating EPA's Position that They Not Be Pursued	Eliminated Thousands of Small Contributors From the Superfund Liability Net
Remove Liability Barriers for Potential Purchasers of Contaminated Property	Facilitated Redevelopment Opportunities at Over 15 Contaminated Sites
Reduce the Cost and Duration of Cleanups Through Guidance on Presumptive Remedies	Issued Presumptive Remedies for Volatile Organic Compounds and Municipal Landfill Sites
Enhance the Role of States in Superfund	Deferred 22 Sites to States Through 7 EPA/State Agreements

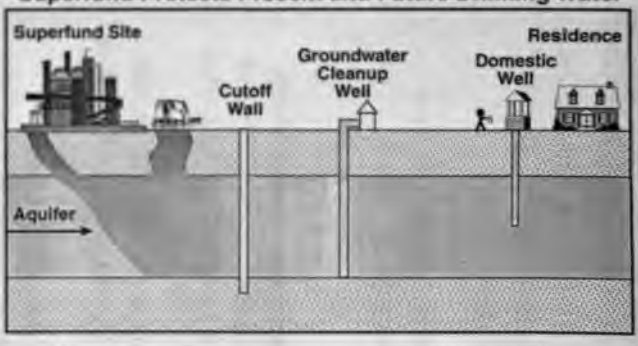
REFORMS II - *February 1995*

Reform	Impact
Test Drive the Allocation Process Where Neutral Party Allocates Shares Among Responsible Parties	Resolving Allocation Disputes at Test Sites and Gaining Critical Experience to Develop Efficient Process
Provide Relief to Lenders by Clarifying Application of Liability Exemption	Reassured Lenders to Effectuate Redevelopment Opportunities and Provide Comfort to Property Owners
Promote Economic Redevelopment of Former Superfund Sites	Awarded 18 Brownfields Pilots Removed 24,000 Sites From the Superfund Inventory (CERCLIS)
Reduce the Cost and Duration of Cleanup Through Additional Guidance	Issued Groundwater Guidance and Land Use Guidance

REFORMS III - *October 1995*

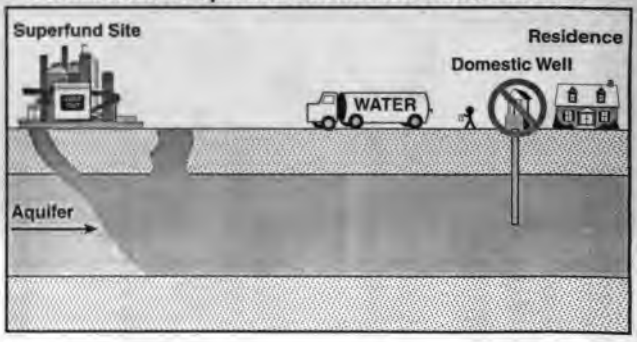
Reform	Impact
Compensate Settlors for a Portion of Orphan Share	Reduce Responsibility of Cooperative Parties for Share Attributable to Insolvent Parties
Further Increase Number of Protected Small Contributors	Eliminate Greater Numbers of Small Parties from Superfund Liability Net
Reduce Oversight of Cooperative Parties Performing Remedies	Decrease Transaction Costs Associated With Oversight of Parties
National Remedy Review Board	Remedy Cost Savings
Remedy "Rules of Thumb"	Time and Cost Savings
Economic Redevelopment	Deleting Portions of Sites
Fostering National Consistency	Faster, Fairer Cleanups Reasonable Risk Assessments Reduced PRP Oversight

Superfund Protects Present and Future Drinking Water



- 91% of sites have an operable well within one mile
- 50% of the U.S. population gets its drinking water from groundwater
- 15% of the U.S. population (40 million people) have private wells
- 40% of annual streamflow in the U.S. is derived from groundwater

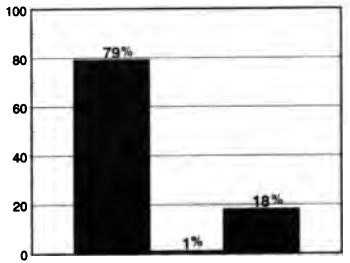
Contamination Spreads Unchecked Under HR 2500



- HR 2500 only prevents ingestion of unhealthy contaminated groundwater
- HR 2500 writes off protection of clean groundwater

One in Four Americans Live within Four Miles of a NPL Site

Within 4 Miles:
5.1 Million Children 0-4
4.7 Million Children 5-9
8.4 Million Over 65



Both cancer and non-cancer risks
Only non-cancer risks
Only cancer risks

Chemicals contributing to risks shown above include:

24% Sites with Chromium Contamination (Known human carcinogen)

21% Sites with Benzene Contamination (Known human carcinogen)

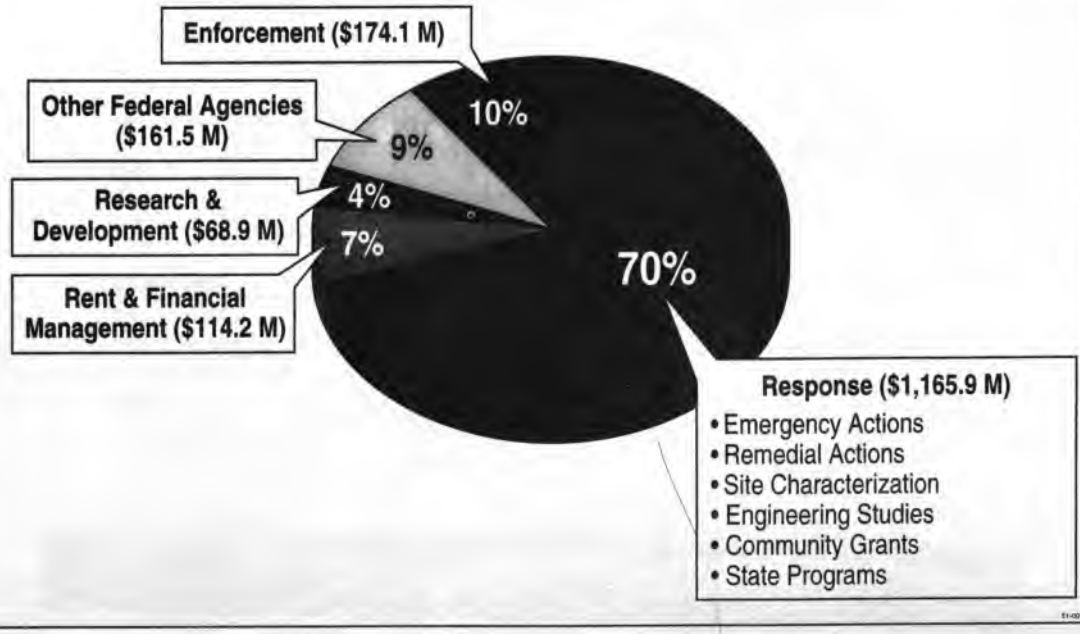
36% Sites with Lead Contamination (Lowers IQ Levels)

12% Sites with Mercury Contamination (Causes brain damage)

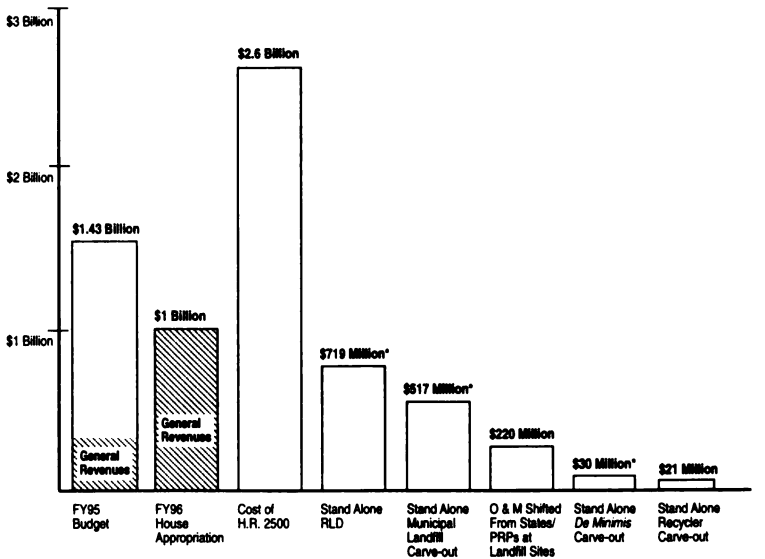
9% Sites with Cyanide Contamination (Nerve damage)

October, 1995

Superfund Trust Fund: 70% of Over $1.6 Billion Goes Toward Cleanup



H.R. 2500 Will Cost Taxpayers



*Note: These represent the incremental cost of implementation as stand-alone provisions over and above the current $1.43 billion base budget.

51-001-105

RUN DATE: 09/08/95
DATABASE: CERCLIS 08/07/95

POTENTIAL NPL CALIBER SITES HAVING COMPLETED
SITE INSPECTIONS WITH HIGH PRIORITY DESIGNATIONS*
(BASED ON CERCLIS DATA THROUGH 07/31/95 AND EPA REGIONAL AND STATE COMMENTS)
NON-FEDERAL SITES

REGION 1	CT	MA	ME	NH	RI	VT		
13	0	0	3	3	5	2		
REGION 2	NJ	NY	PR	VI				
30	2	25	2	1				
REGION 3	DE	MD	PA	VA	WV			
108	0	10	68	15	15			
REGION 4	AL	FL	GA	KY	MS	NC	SC	TN
138	4	65	26	1	2	21	15	4
REGION 5	IL	IN	MI	MN	OH	WI		
226	74	42	20	7	53	30		
REGION 6	AR	LA	NM	OK	TX			
41	2	11	8	8	12			
REGION 7	IA	KS	MO	NE				
9	3	1	4	1				
REGION 8	CO	MT	SD	UT	WY			
56	11	10	5	30	0			
REGION 9	AZ	CA	HI	NV	MN			
68	8	56	3	0	1			
REGION 10	AK	ID	OR	WA				
7	0	5	0	2				
NATIONAL								
696								

INCLUDES SITES WITH COMPLETED SITE INSPECTIONS AND "HIGH PRIORITY" DESIGNATIONS; SITES WITH COMPLETED EXPANDED SITE INSPECTIONS (ESI) OR INTEGRATED EXPANDED SITE INSPECTION/REMEDIAL INVESTIGATIONS (ESI/RI), HAVING "RECOMMENDED FOR HAZARD RANKING SYSTEM (HRS) SCORING" DESIGNATIONS; SITES HAVING COMPLETED HRS PACKAGES; SITES WITH ONGOING ESIs, ESI/RIs, OR HRS PACKAGES; AND SITES PROPOSED TO THE NATIONAL PRIORITIES LIST (NPL). CERCLIS DATA PULL WAS MODIFIED BASED ON EPA REGIONAL AND STATE COMMENTS.
NOTE: THIS LIST EXCLUDES SITES INCLUDED IN THE SEPTEMBER 1995 NPL FINAL RULE.

State of North Carolina
Department of Environment,
Health and Natural Resources

James B. Hunt, Jr., Governor
Jonathan B. Howes, Secretary
Linda Bray Rimer, Assistant Secretary
for Environmental Protection

October 25, 1995

Carol M. Browner, Administrator
Environmental Protection Agency
401 M Street, SW
Washington, D. C. 20460

Dear Administrator Browner:

I am writing to give you our thoughts on the provisions of H.R. 2500. Since we have had the bill in hand for only 48 hours, our staff analysis is based on a very limited review. We think that the bill sets forth some very positive concepts in the move to amend CERCLA, namely the community participation provisions, the retention of most of retroactive liability, and the increased state role in the Superfund process. However, we have concerns with the bill's attempt to amend other sections of CERCLA.

1. Cap on the NPL

We are concerned that a cap on the National Priorities List could endanger the national goal of cleaning up abandoned hazardous waste sites. With so many sites still needing remediation, a cap on the NPL will limit the universe of sites at which the federal government can order cleanups. It will also act as a disincentive for voluntary cleanups since it will remove the potential of liability under CERCLA. Finally, orphan sites which go unlisted because of the cap, will be left to the states for cleanup without a funding source.

2. Disregarding ARARs during remedy selection

We would like to retain the flexibility to apply state standards where appropriate to assure proper remediation in areas of unique geographic and climatic conditions. We are concerned that the exclusion of state ARARs from the remedy selection process may not achieve the protectiveness sought by the state and may leave the state responsible for additional site remediation.

3. Reimbursement for cleanups under retroactive liability

We are concerned that reimbursements from the fund for incurred cleanup costs discourage voluntary cleanups in that they provide financial incentives to responsible parties to have their sites listed on the NPL. This seems to be in conflict with other provisions of the bill that would cap the NPL. It may also reduce the amount of money available for the cleanup of orphan sites.

We hope our initial comments are helpful and we look forward to working with you and Congress on efforts to improve the Superfund process.

Sincerely,

Linda B. Rimer

STATE OF UTAH

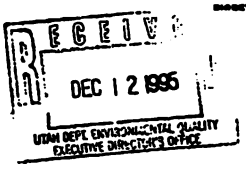
MICHAEL O. LEAVITT
GOVERNOR

WASHINGTON OFFICE OF THE GOVERNOR
400 NORTH CAPITOL STREET, SUITE 370
WASHINGTON, D.C. 20001

OLENE S. WALKER
LIEUTENANT GOVERNOR

JEANNE SNOW NEUMANN
DIRECTOR

December 6, 1995



The Honorable James V. Hansen
United States House of Representatives
2466 Rayburn Building
Washington, DC 20515

Dear Representative Hansen:

The purpose of this letter is to request your opposition to any amendment to Superfund which would exempt Bevill Wastes from regulation under the Comprehensive Environmental Response and Compensation Liability Act (CERCLA).

Attached is a position paper prepared by the Utah Department of Environmental Quality (DEQ), which summarizes the problem. The immediate issue is a proposed amendment by Representative Crapo to H.R. 2500, which is pending before the House Commerce Committee.

Changes to Superfund which encourage voluntary clean-ups, provide more workable, site-specific remedies, and resolve innocent-party liability problems are essential. However, exempting certain waste streams from regulation under Superfund goes far beyond that objective. The Department of Environmental Quality has worked hard with local communities, industry, and EPA Region VIII to develop workable solutions for clean-up of potential Superfund sites, including Kennecott, Sandy Smelter, West Jordan Brownfields Community Clean-up (EPA grant award), and the Ironton site in Provo. All of these properties, and numerous similar sites in Utah which pose a threat to public health and safety, are contaminated with Bevill Wastes. If such wastes are exempt from Superfund regulation, there will be no need or incentive for companies to work with communities and the state to find workable solutions. The state cannot afford to clean-up such sites, in the absence of contributions from Superfund or voluntary agreements with the parties.

If you need additional information, please contact either Dianne Nielson, Executive Director of DEQ, 801-536-4402, or Kent Gray, Director of the Division of Environmental Response and Remediation, DEQ, 801-536-4127. Thank you for your consideration of this important issue.

Sincerely,

Michael O. Leavitt
Governor

UTAH DEPARTMENT OF ENVIRONMENTAL QUALITY

POSITION ON REPRESENTATIVE CRAPO'S PROPOSED AMENDMENT TO CERCLA REGARDING EXEMPTION OF BEVILL WASTES FROM REGULATION UNDER SUPERFUND (CERCLA)

NOVEMBER 30, 1995

Representative Crapo, of Idaho, has proposed amending Superfund to exempt "Bevill wastes" from regulation under Superfund. These wastes include:

- drilling muds, produced waters, and other wastes associated with the exploration,

development, or production of oil, gas or geothermal energy;
- fly ash waste, bottom ash waste, slag waste, and flue gas emission control waste generated primarily from the combustion of coal or other fossil fuels;
- solid wastes from the extraction, beneficiation, and processing of ores and minerals; and
- cement kiln dust (CKD).

The exemption would not apply to sites that are on the National Priorities List, have a signed Record of Decision, or are subject to an order under the emergency response authorities of Superfund.

If uncontrolled and reclaimed, Bevill wastes can pose a serious threat to human health and the environment. The amendment would negatively effect Utah in the following ways:

1. There are a number of contaminated sites in Utah under the purview of Superfund that would not be subject to any regulatory authority if this amendment is passed. These sites include; Kennecott, Murray Smelter, Richardson Flat, several CKD contaminated sites, and several historic smelter sites. Utah does not have the authority to require clean-up of these sites, and the federal Superfund is the only mechanism available to ensure that threats associated with these sites are mitigated.

2. There is also a concern that the amendment would effect Natural Resource Damage Claims (NRDC) that are allowed by Superfund. The State would be prohibited from filing claims for damage to natural resources that were a result of Bevill wastes.

UDEQ POSITION: Utah does not have independent authority to file NRDCs or require clean-up of sites contaminated with Bevill wastes. Therefore, Utah opposes the Crapo amendment as drafted.

STATE OF WASHINGTON

OFFICE OF THE GOVERNOR

P.O. Box 40002 • Olympia, Washington 98504-0002 • (206) 753-6780

October 25, 1995

Ms. Carol Browner, Administrator
Environmental Protection Agency
401 M Street SW
Washington, D.C. 20460

Dear Ms. Browner:

I am writing to express my grave concerns about H.R. 2500, the recently introduced bill to reauthorize and amend Superfund. As introduced, this legislation will be extremely detrimental to the timely and thorough cleanup of hazardous waste sites in the state of Washington. I wanted to convey those concerns to you, as I understand that you are to testify before the House Commerce Committee's Subcommittee on Commerce, Trade and Hazardous Materials on October 26, and will have an opportunity to transmit my views to the Committee members.

H.R. 2500 will result in minimal low-cost cleanup remedies
The bill's cost and remediation principles will create a bias towards minimal action. By establishing a preference for least cost cleanups and allowing passive remedies with legal controls to be considered equally with treatment and removal, the bill will discourage thorough and necessary remedies. This approach will allow land to remain contaminated and more ground water to grow polluted. We firmly believe that standards must be set to protect the most sensitive members of the population and ensure a safe environment.

H.R. 2500 will delay cleanups and create unfunded mandates
We agree with the concept of allocating costs among responsible parties. However, decisions must be reached quickly and must be binding and final. We cannot support any change in the current liability system that will worsen Superfund's problems of delay or crate mandates that the Hazardous Waste Superfund cannot support. The proposed system allows as much as two and one half years to allocate costs and provides for judicial review against the new remedy procedures even at sites where cleanup is underway. These changes would work against achieving faster cleanups more promptly, which should be the basic goal of Superfund reform.

H.R. 2500 will lead to inconsistent standards for Federal Facilities
We support the move to cleanup federal facilities under the same rules and constraints as private party sites. However, under H.R. 2500, the state and federal requirements for federal facilities would be inconsistent. We are particularly concerned that the impact of these provisions will minimize cleanup of Hanford facilities. The bill also fails to clarify that its application to federal facilities explicitly includes both formerly and currently owned or operated facilities.

H.R. 2500 will preempt State Laws
The bill's provisions on delegation preempt existing state law and cleanup standards. For a state such as Washington, with a strong cleanup program, this will result in a dual set of standards for cleanups, with the stronger standards our citizens support implemented only on state sites. The most contaminated sites -- those on the National Priority List -- will be cleaned up to less protective levels.

The changes embodied in H.R. 2500 do not provide the flexibility to recognize the success of our state program nor do they meet the intent of speeding up the pace of cleanup. For these reasons, we would strongly urge that the bill be modified before the Committee adopts it. We hope you will transmit these concerns to the committee and convey our willingness to work with them to develop a bill that effectively improves the Superfund program.

Thank you for your assistance.

Sincerely,

Mike Lowry

MIKE LOWRY
Governor

cc: Washington Congressional Delegation

MARYLAND DEPARTMENT OF THE ENVIRONMENT
2500 Broening Highway • Baltimore, Maryland 21224
(410) 631-3000

Parris N. Glendening
Governor

Jane T. Nishida
Secretary

October 25, 1995

The Honorable Steny H. Hoyer
1705 Longworth House Office Building
Washington D.C. 20515

Dear Congressman Hoyer:

I am writing to you on behalf of the Maryland Department of the Environment to express our views on H.R. 2500, legislation to reauthorize the Comprehensive Environmental Response and Compensation Liability Act (CERCLA) or "Superfund" that was introduced recently by Representative Michael Oxley (R-OH). We are pleased that this proposal includes a number of improvements to the discussion draft that was circulated earlier for comment. However, we believe that H.R. 2500 may undermine Superfund's fundamental "polluter pays" principles and compromise the ability and authority of the Department to protect Maryland's public health and environment.

The Department shares many of the goals identified in H.R. 2500, particularly the need to speed Superfund site cleanups, reduce cleanup costs, and provide meaningful citizen and State participation in the remedy selection process. The Department supports provisions for the safe and economic redevelopment of abandoned industrial "brownfields" sites. Such redevelopment can help create jobs for Maryland citizens and encourage necessary, new investment in many of our State's existing industrial areas. The Department also supports provisions to enhance the successful emergency response program, increasing both the duration and authorized funding cap.

The Department has identified three primary concerns with H.R. 2500: 1) its changes to the current liability regimes; 2) its preemption of state roles and standards; and 3) its remedy selection criteria. These concerns are consistent with earlier comments we have made on draft proposals.

The liability regime established in current law forms the basis for funding Superfund cleanups throughout the nation. This regime is based upon the concept that those responsible for uncontrolled releases of pollution shall pay the costs associated with cleanup actions necessary to protect public health and the environment. Unfortunately, H.R. 2500 undermines this fundamental regime by weakening the retroactive and strict, joint and several liability provisions of current law. At the same time, the legislation does not identify realistic or practical funding sources to supplement any liability reduction for current responsible parties or potential responsible parties.

The State of Maryland is in no position to assume new costs for funding federal or State Superfund site cleanups if the liability regime is changed as proposed in H.R. 2500. There are a number of sites in Maryland where the proposed retroactive liability changes will jeopardize potential funding sources and likely delay cleanup. The Department believes that the potentially responsible parties should rightly be held accountable for cleanup costs.

Maryland has a successful federal facilities program with oversight responsibilities for 38 Department of Defense and other related sites, encompassing in excess of 200,000 acres. We have an excellent relationship with most of these facilities. Surrounding communities have come to rely upon the Department to oversee various cleanup activities to make sure that public health and the environment are protected adequately. This has become particularly important at the U.S. Army's Aberdeen Proving Ground (APG) which is one of the nation's most severely contaminated federal sites on the shore of the Chesapeake Bay.

The Department cannot support provisions of H.R. 2500 which would preempt and compromise the State's authority to set standards and oversee federal cleanup activities. We do not believe that federal facilities should be treated differently or given weaker cleanup standards than other sites on the National Priorities List. The Department maintains that State standards and remedy selection criteria should apply to federal facilities.

Finally, the Department would like to express its concern with the proposed remedy selection criteria in H.R. 2500. The Department would like to acknowledge that the proposed language is a significant improvement over the discussion draft we reviewed earlier. However, it still falls short of what we believe is necessary to protect public health and the environment. Although we agree that "cost-effectiveness" is an essential criteria for selecting remedies, we do not believe it should be the predominant criteria.

For example, within APG is an old, 5-acre landfill which contains large quantities of chemical waste, chemical warfare material and unexploded ordnance. Under a strict "cost effectiveness" criteria, long-term solutions to protect public health and the Chesapeake Bay may not be implemented. The continued fencing-off of the area is clearly the least expensive method of preventing access and direct exposure to the chemical wastes. The Department believes that a long-term "pump and treat" containment system, in conjunction with the use of an innovative "permeable infiltration unit" to cover the landfill, is a better (yet more costly) solution to address the site specific risks to both human health and the environment.

Superfund reform is essential to Governor Glendening's goals of encouraging economic development and protecting Maryland's communities. The Department will make its staff and resources available to you and other Members of the Delegation as this legislation proceeds. If I can be of any assistance, please do not hesitate to contact me.

Sincerely,

Jane Nishida

Jane T. Nishida
Secretary

cc: Honorable Carol M. Browner, Administrator,
U.S. Environmental Protection Agency
Honorable Tom Looby, President,
Environmental Council of States

TOM UDALL
OFFICE OF THE
ATTORNEY GENERAL
STATE OF NEW MEXICO

FOR IMMEDIATE RELEASE
October 4, 1995

CONTACT: Kay Roybal
Communications Director
(505) 827-6000

UDALL URGES DEFEAT OF PROPOSED SUPERFUND LEGISLATION

Attorney General Tom Udall said today that legislation introduced Friday in the U.S. Senate would gut the federal Superfund program for the cleanup of toxic waste sites.

"If enacted, the legislation would have a devastating impact on toxic waste cleanups in New Mexico," Udall said. "The environmental progress we have made over the last 30 years is severely threatened by this kind of legislation."

Senate Bill 1285, introduced by Senator Robert Smith (R-New Hampshire), would allow the liable parties to choose the remedy for cleanup of a site, severely limit EPA or state oversight of liable parties in implementing cleanup, and allow remedy decisions to be reopened at sites where cleanup is underway or has not begun, potentially delaying cleanup for years.

The bill would also limit the number of sites that would be listed for Superfund cleanup to 30 sites per year for the next three years, with no further listings thereafter. It would allow for the pre-emption of state law and shorten the statute of limitations for state claims for damages for injury to natural resources. Similar legislation is expected to be introduced in the House of Representatives next week.

"This legislation would delay cleanup at several sites in New Mexico," Udall said. "For example, EPA might be forced to reopen its cleanup decisions for the South Valley groundwater contamination in Albuquerque, the Cleveland Mill mine site near Silver City, and the Prewitt Refinery near Grants, and implement cleanups at these sites that are much less protective of health and the environment.

"The bill would result in a different remedy selection for the AT&SF tie treating facility in Albuquerque, with the company

responsible for the pollution making the decision. It would largely eliminate the incentives for companies like Molycorp to enter into cleanup negotiations with the Environment Department, and would cripple the new natural resource damage program in New Mexico," Udall said.

Udall urged concerned citizens to contact their Congressional delegation to voice opposition to the proposed Superfund legislation.

Reform bill could derail toxic cleanup

Santa Fe New Mexican October 5, 1995

By KEITH EASTHOUSE
The New Mexican

A bill introduced in the U.S. Senate to reform the federal Superfund program would delay and possibly derail the cleanup of toxic sites in New Mexico, state Attorney General Tom Udall said Wednesday.

"The environmental progress we have made over the last 30 years is severely threatened by this legislation," Udall said in a prepared statement.

Among the contaminated sites that could be affected are the Molycorp molybdenum mine site near Questa, which many believe has polluted a two- to three-mile section of the Red River, the Lee Acres landfill near Farmington, and the Cleveland Mill mining area near Silver City.

Additionally, Udall said, the bill could cripple a relatively new program that enables the state to assess the extent to which polluted sites have damaged New Mexico's natural resources and to make claims against liable parties.

The bill, introduced last week by Sen. Robert Smith, R-N.H., would make the following changes to the way the state and federal governments handle the cleanup not only of sites on the federal Superfund list, but also those seriously contaminated but:

- It would give polluters more control over determining the method for cleaning up a site.
- It would significantly reduce the extent to which the U.S. Environmental Protection Agency and state agencies could monitor the progress polluters are making in cleaning up sites.
- It would limit the number of sites nationwide that could be listed for Superfund cleanup to 25 sites per year for the next three years, with no listings thereafter.
- It would allow negotiated decisions that have already been made between polluters and oversight agencies about how to clean up contaminated sites to be reopened — a provision that Udall said could delay cleanups for years.

Tom Udall

A similar bill is expected to be introduced soon in the House. Congress is in the midst of a one-week recess and efforts to contact Smith's office for comment were unsuccessful.

Whether Smith's bill could pass in its current form is unclear.

The bill is in line with many other environmental bills that have either been passed or are pending before Congress. But there are signs that an alliance of moderate Republicans and Democrats could modify or stop some of this legislation.

Assistant Attorney General Charlie De Saillan said the hope in Udall's office is that if Smith's bill is approved, President Clinton will veto it.

The Superfund program has long been a source of controversy because of the slowness with which cleanups have proceeded and the high costs that have resulted.

In line with that last concern, Smith's bill would give polluters liable for wastes disposed of before 1980 a 50 percent tax credit to help cover cleanup costs — effectively passing half of the cost for such cleanups to taxpayers.

The bill also makes cost effectiveness the paramount criterion in determining the choice of a cleanup method. Under current law, cost is just one of a variety of factors that are used in making cleanup decisions.

The bill would also give higher priority to containing pollution rather than cleaning it up.

De Saillan said if Smith's bill is passed, it could mean contamination at the Molycorp mine site will never get cleaned up.

Molycorp is in the midst of negotiating an agreement with the New Mexico Environment Department about conducting a voluntary cleanup. Driving the negotiations is the possibility that the Molycorp mine site could be placed on the federal Superfund list — a step that would in all probability greatly drive up cleanup costs for Molycorp.

If Smith's bill becomes law, the site in all likelihood would not get placed on the Superfund list. That, in turn, would remove the pressure on Molycorp to do a voluntary cleanup.

"If this legislation were passed, it would remove a significant incentive for Molycorp to voluntarily conduct a cleanup of the site," De Saillan said. "There's a good chance it wouldn't get cleaned up."

TEXAS NATURAL RESOURCE CONSERVATION COMMISSION

Protecting Texas by Reducing and Preventing Pollution

October 11, 1995

Mr. Stan Meiburg
Acting Regional Administrator
U.S. Environmental Protection Agency
Region VI
1445 Ross Avenue, Suite 1200
Dallas, Texas 75202-2733

Re: Federal Preemption of State Standards

Dear Mr. Meiburg:

This letter responds to your question concerning the Texas Natural Resource Conservation Commission's position on preemption of state standards. Under the current federal Superfund law on-site remedial actions are exempted from permits but must meet the substantive requirements of all "applicable and/or relevant and appropriate" standards (ARARs). This requirement has proven at times to be quite controversial. States and EPA have argued about the use of "relevant and appropriate" standards in setting cleanup levels and selecting remedies. Some stakeholders have charged that states have improperly and inconsistently applied such standards and that their application has driven up the cost of remedies. States have argued that there are often unique situations in many states which these rules are intended to address and that preemption of such standards would be an abrogation of states' rights.

The Superfund reauthorization bill, which Representative Oxley is about to introduce in the House, contains language that would preempt federal, state and local standards in the federal program. The bill states that instead "the standards set forth in [the bill] shall govern the degree of cleanup, remedy selection and on-site management of hazardous substances." The bill is quite general about how these issues would be addressed particularly regarding on-site management. Thus, current state rules regulating discharges to air and water would no longer be applicable at federal Superfund sites. In addition, standards of local jurisdictions established to deal with area specific situations such as the Harris County Flood Control District and the Houston-Galveston Subsidence District would no longer have to be considered.

The National Governor's Association, the Environmental Council of the States (ECOS) and Association of State and Territorial Solid Waste Management Officials have all taken positions opposing federal preemption of state standards. TNRCC in its comments to ECOS has similarly opposed preemption. We recommend that Congress adopt the proposal considered but not passed in the last Congress. This approach was arrived at through the consensus of industry, environmental and community groups, and regulators. It proposed that only applicable state standards would be considered and that the concept of relevant and appropriate standards be eliminated. For a state standard to be applicable, it must be promulgated through a public process as a state rule specifically applying to Superfund remediation.

If you have any questions on this, please call me or contact Mr. James A. Feeley of the Technical Support Section at 512/239-2458.

Sincerely,

Dan Pearson
Executive Director

National Conference of State Legislatures

OFFICIAL POLICY

ENVIRONMENT

HAZARDOUS WASTE MANAGEMENT POLICY

Over the past two decades, the adage "out of sight, out of mind" has given way to a national program that seeks to encourage source reduction, high-technology treatment, and secure disposal of hazardous wastes. Congress enacted the Resource Conservation and Recovery Act of 1976 (RCRA), the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), and subsequent amendments and reauthorizations of this initial legislation to implement its national program. Such legislation requires the treatment, storage and disposal of hazardous wastes and cleanup at contaminated sites so as to minimize the present and future threat to human health and the environment. Despite this national program, hazardous waste continues to be a significant environmental problem.

To address this issue, elected officials, federal and state agency administrators, industry leaders, environmental groups and the public must realistically assess potential environmental threats, continue to engage in an open dialogue, and attempt to find workable solutions to the increasingly complex problem of hazardous waste.

The National Conference of State Legislatures (NCSL) believes that the following principles must be accommodated in crafting a national solution to hazardous waste management:

- Hazardous waste is a widespread national problem which poses a significant potential threat to public health and the environment.
- The public overwhelmingly supports programs that address the responsible treatment, handling and disposal of hazardous waste and the cleanup of contaminated sites.
- Improper treatment, handling and disposal of hazardous waste constitutes a national problem that deserves a national solution. The federal government

has an appropriate role to play in crafting a coherent, coast-to-coast solution to abandoned and inactive hazardous waste sites. Congress should not abandon the federal government's commitment to cleaning up hazardous waste sites. Congress should not attempt to terminate the Superfund program through placing a numerical ceiling or cap on the number of sites that may be eligible for listing on the Superfund National Priorities List.

- The cost of properly stabilizing, treating and disposing of improperly disposed of hazardous waste is significant. Congress should continue to finance hazardous waste site cleanup efforts through national, broad based financing mechanisms that uniformly spread the costs of such cleanup efforts over a national revenue base. Congress must recognize that states acting alone do not possess the ability of the federal government to impose such costs nationally. Therefore, Congress should continue the present funding mechanisms that currently provide federal dollars for hazardous waste site cleanup efforts.
- Our nation's natural resources are one of the many victims of improper hazardous waste disposal. Natural resources constitute one of our nation's most valuable assets and must be safeguarded and in many cases restored.
- Aspects of the current system discourage recycling by regulating many byproducts as hazardous waste. A separate system for regulating hazardous materials destined for recycling should be established.
- Other methods for dealing with hazardous waste, aside from disposal, such as source reduction, pollution prevention, reuse and recycling should be encouraged and developed.
- A cleanup that is delayed is a cleanup denied. The federal government must promote measures that will expedite actual site cleanups and site construction activities.

Consequently, NCSL believes that any solution to our hazardous waste problems must include the following:

- Congress and the U.S. Environmental Protection Agency (U.S. EPA) should adopt policies that encourage both the hazardous waste content of products and industrial hazardous waste by-products be kept to a minimum, and that hazardous waste materials be reused, recycled or made non-hazardous whenever possible.
- Congress and the U. S. EPA should continue to fund, develop and improve

hazardous waste risk assessments, toxicological profiles of priority pollutants found at Superfund sites and consequent long term health and environmental impacts data. The work of the Agency for Toxic Substances and Disease Registry (ATSDR) should be supported and expanded. Such studies and work should be funded through disbursements from the Superfund Trust Fund. Any information gathered from either federal or private sources should be subject to peer review and made available as needed.

- Historically, the federal government has been the largest producer of hazardous waste. Therefore, Congress and the federal government should adopt hazardous waste reduction policies to reduce waste and develop new and improved waste elimination technologies. Such policies should include new federal procurement guidelines that permit suppliers to modify their manufacturing processes to accommodate pollution prevention practices.
- Congress should adopt policies that promote the availability of affordable environmental liability insurance, including economic incentives for industry to establish its own voluntary insurance pool or insurance fund. This would alleviate the difficulty industry has had obtaining liability insurance for hazardous waste cleanup, and insure that money is available for cleanups.
- States should be allowed as much flexibility as possible in devising their hazardous waste management plans and regulations, including the setting of priorities.
- Congress should establish a mandatory Superfund cleanup schedule for the U.S. EPA to ensure prompt, but thorough investigation, study and cleanup of existing Superfund sites, and identification of new Superfund sites.
- The federal government must collect and disseminate to the public information on chemical storage, use and disposal practices by government and industry.
- State and federal hazardous waste management laws should be vigorously enforced in order to reduce potential human and environmental exposure and to maintain public confidence in such programs. In the absence of appropriate agency action, citizens should be allowed to avail themselves of such enforcement mechanisms.
- Congress should support policies that reduce the importation of hazardous waste from foreign countries based on treaties and other agreements.

- Congress should establish policies that decrease the dumping of hazardous waste in developing countries.

Regarding legal issues associated with hazardous waste management, NCSL supports:

- Health effects studies designed by the federal government should be comprehensive enough to be admissible as evidence in victims' compensation court cases.
- Cleanup liability protection for non-responsible landowners, renters, or lessees, and institutions or persons financing cleanup activities at a site previously contaminated by hazardous waste or petroleum products. Protection should be made available based on a cleanup plan instituted at the time a contract is entered into, but would not exempt entities from responsibility for hazardous waste disposal or practices that occurred on the property during their involvement.
- Limited liability protection for state and local governments owning, managing or utilizing a landfill that accepted hazardous waste and was later designated a Superfund site. NCSL should join with the National League of Cities and the National Association of Counties to pursue this relief.

With respect to attempts to reauthorize or amend CERCLA, NCSL believes that Congress should be guided by the following principles:

- No state laws or regulations shall be preempted or infringed. Compliance with state laws and regulations shall not be conditioned upon state governments paying the costs of such compliance.
- In the absence of compliance with state laws and cleanup standards, states should not be required to commit any resources to a particular site cleanup. In effect, states should not have to contribute financially to a cleanup that is not conducted in accordance with state law. It is inappropriate for the federal government to mandate state financial participation in constructing a remedy that is violative of state law.
- The current retroactive, strict, joint and several liability scheme must be reviewed for cost effectiveness, but should be maintained until Congress replaces it with a guaranteed new funding liability scheme that provides an equivalent level of resources for cleanups without any additional allocation of public funds. A more efficient private sector financing mechanism should be adopted as the primary funding source for Superfund cleanups. However,

any new funding mechanism must maintain the "polluter pays" principle and ensure that private sector resources remain the primary funding source for Superfund site cleanups.

- Any modification to the current liability scheme must guarantee that liability determinations will not become further complicated or lead to an increase in transaction costs. Congress should focus its efforts on ways to reduce, not increase, litigation transaction costs at Superfund sites. The current "polluter pays" liability scheme results in responsible parties cleaning up the majority of Superfund sites (70%) and provides a powerful incentive for the proper disposal of hazardous waste that is currently being generated. Congress must remain mindful of the "collateral" benefits that have been produced thorough the operation of RCRA and CERCLA. Collateral benefits include activities such as improved waste management practices, recycling, pollution prevention measures and waste minimization.
- Any modification of the current liability scheme must ensure that the financial resources available to finance remedies at Superfund sites do not diminish. Similarly, any change in the current continuing liability scheme must not result in slower cleanups or higher transaction costs. Any reduction in private sector financial liability for Superfund sites must not result in an increase in public sector financial liability for such cleanups.
- Any attempt to alter the current liability scheme must recognize the fact that 23 states have liability schemes that closely reflect or mimic CERCLA's "polluter pays" approach to site remediation financing. Any alteration in the federal model will have far reaching implications for the ability of states to finance their own site remediation programs. This is especially true for those states without independent state legislative programs who rely upon CERCLA for their authority to address hazardous waste issues.
- The U.S. EPA estimates that over 700 hazardous waste sites are currently eligible, pursuant to hazardous ranking score (HRS) criteria, for listing on the National Priority List (NPL). Current reform efforts in Congress would limit the number of new sites that could be added to the NPL to approximately 100. By limiting the number of new sites that are eligible for the NPL, Congress is effectively eliminating the Superfund program. Beyond the additional 100 sites, the federal government will provide no further financial assistance to states in addressing over 600 hazardous waste cleanups. Many states have

"banked on" this anticipated federal financial assistance in formulating their long term hazardous waste site remediation strategic plans. Congress should not eliminate the federal hazardous waste program nor its commitment to assist states in financing such hazardous waste cleanup efforts.

- Congress must not eliminate CERCLA's present site cleanup financing mechanism unless and until a substitute financing mechanism is adopted in its place that provides an equivalent and guaranteed level of funding for actual site cleanups and program activities. It is unacceptable for Congress to eliminate the present site cleanup financing mechanism without providing an equivalent alternative. In the event that Congress were to do so, state citizens would inevitably pressure state legislatures to fill the financing void in an effort to ensure that local hazardous waste cleanup efforts proceed as planned.
- Congress should reduce state "cost-share" requirements at Superfund sites. Congress should be mindful that the forced allocation of state resources to National Priority List (NPL) sites comes at the expense of state efforts to remediate non-NPL sites. Congress should limit the state "cost-share" at Superfund sites to 10% of remedial action costs and 10% of total operation and maintenance costs.
- States should have a greater role in all aspects of Superfund decision making. The U.S. EPA should be allowed to authorize states to manage the program if they request such a delegation. States should have state laws and regulations at least as stringent as those at the federal level in order to qualify for delegation. In addition to states being allowed to assume "primacy" for all aspects of the Superfund program, states should be allowed to impose their own stricter cleanup standards at sites. Regardless of any delegation of program authority to individual states, EPA should nonetheless retain authority to engage in emergency response actions at any location it deems necessary after appropriate consultation with the state concerned.
- Presumptive, standardized cleanup remedies should be available for sites which have common characteristics. Cleanup standards addressing "how clean is clean" must be adopted to streamline the remedy selection process. Congress should maintain the federal commitment to permanency in

treatment. Permanent solutions to improperly disposed of hazardous waste must be accorded preference over attempts to control access or exposure to such waste. Long term economic redevelopment efforts will be hurt by a national policy that defers actual site cleanups.

- Completed remedy selections (i.e. site cleanup plans) at Superfund sites should remain intact and should not be reopened. Any attempt to revise or discard previous decisions regarding cleanup plans at Superfund sites will result in a dramatic slowdown of cleanup activity. States have a compelling interest in seeing that presently planned and scheduled cleanups remain on course. Further delays in construction activities at Superfund sites will further jeopardize the property values and welfare of state citizens that live in proximity to such sites. Pre-enforcement judicial review of remedy selection decisions will also delay site construction activities. Congress should maintain the prohibition on pre-enforcement review and resist any other efforts that will further delay actual cleanup and site construction activities.
- States should be granted a larger role in all aspects of decision making and remedy selection at federal facilities that are Superfund sites. Federal facility Superfund site cleanups should not be financed through the Superfund Trust Fund. Responsible parties that are agencies, political subdivisions or instrumentalities of the federal government should not be accorded preferential treatment with respect to any aspect of the Superfund program or state laws. Congress should fully fund efforts to promptly address contamination at federal facilities.
- Communities affected by Superfund sites should have direct and meaningful input into decisions regarding those sites. Community views on matters such as future land use shall be accorded "substantial weight" in any decision making process.
- Risk assessment and cost\benefit analysis should be considered during the remedy selection process. Any remedy selection process should fully factor in risks posed to sensitive subpopulations such a pregnant woman and children. Cleanup decision and remedy selection should be determined on the basis of public health and environmental protection and should not be pre-determined by requirements that mandate the selection of "lowest cost" cleanup options.

most appropriate and effective. Congress should not place arbitrary liability "caps" on restoration budgets or damages resulting from the destruction or impairment of natural resources.

- Funding must be made available to states for natural resource damage assessment and restoration. Without funding, trustees are and will continue to be unable to assess damages to natural resources and develop and implement plans of restoration.
- States should be given the opportunity to recover all costs, including administrative costs, associated with a claim for natural resource damages against those parties responsible for the damage.
- The federal government should be subject to all state laws governing the cleanup of waste materials and be held responsible for payment of natural resource damages to states. Payment by federal facilities for state natural resource damages should be independent of Superfund monies.
- States should be provided with adequate federal financial and technical assistance in overseeing their natural resource damage programs.
- Congress must remain mindful that states are heavily dependent upon their groundwater reserves. States, as Fiduciaries, have obligations to safeguard their natural resources, which include groundwater. According to U.S. EPA surveys, 95 percent of rural and 35 percent of urban households obtain their drinking water from groundwater. Agricultural production is also very dependent upon groundwater. Groundwater cleanup remedies under Superfund should be consistent with the standards and requirements applicable to the use of that water.
- The implementation of activities designed to minimize both the use of hazardous materials and the generation of hazardous pollution by both the public and private sectors should be encouraged through federal legislation, environmental regulations and permits. Such efforts should be accompanied by strong federal enforcement.

NATIONAL GOVERNORS ASSOCIATION

Tommy G. Thompson
Governor of Wisconsin
Chairman

Bob Miller
Governor of Nevada
Vice Chairman

Raymond C. Scheppach
Executive Director

Hall of the States
444 North Capitol Street
Washington, D.C. 20001-1512
Telephone (202) 624-5300

November 16, 1995

The Honorable Thomas J. Bliley Jr.
Chair, House Commerce Committee
United States House of Representatives
Washington, D.C. 20515

Dear Mr. Chair:

The National Governors' Association (NGA) is pleased to have reviewed the Superfund reform bill, H.R. 2500. Before full committee markup begins on H.R. 2500, the Governors would like to express support for many aspects of Congressman Michael Oxley's proposal, and we applaud the efforts that have been taken to make the Superfund program more effective and reasonable. We would also like to recommend a number of changes to strengthen the proposal.

State Standards. The Governors oppose the preemption of state applicable standards at National Priorities List (NPL) sites, and we urge you to delete this provision from your proposal. Even though state applicable standards related to water and air emissions may be applied at some sites, the Governors feel that the provision does not go far enough. State standards are applied for specific media and for addressing site-specific conditions in an effort to adequately protect human health and the environment based on local circumstances. In particular, we want to ensure that state standards protecting groundwater are respected in Superfund cleanups.

Liability Reform. We realize that the issue of liability has been a contentious area in the Superfund reform proceedings, but we want you to know that the Governors would support a repeal of retroactive liability at municipal landfills. The Governors support addressing the liability of municipalities, *de minimis* and *de micromis* parties, lenders, and prospective purchasers as a positive step that will reduce transaction costs and extensive litigation. In considering any broader liability reform, however, we urge you to consider the significant effects such reform will have on state cleanup programs as well as on the size of the cost share required of states for federally-funded cleanups at NPL sites. Additionally, it is important to note that the current federal liability provisions have produced a significant responsible party cleanup effort.

We also ask that you ensure that states are not the victims of cost shifts due to reforms in Superfund liability. The states do not believe the proposal to allow states to petition the Office of Management and Budget for reduction in cost share is an adequate solution to this problem. This process is not realistic and would probably not be effective.

Reopening Records of Decision. Although there may be some records of decision (ROD) that should be reconsidered, we believe the bill as drafted allows too many RODs to be reopened. This invites expensive litigation and could cause significant delays in cleanups. We believe the provision should be eliminated or substantially narrowed. At a minimum, a Governor should be given the right of concurrence with the decision to reopen any ROD in his or her state.

Natural Resource Damages (NRD). The NRD title of H.R. 2500 does not provide solutions to many states' concerns with the law. Currently, NRD assessments cannot be funded from the trust fund. The Governors believe the prohibition on funding NRD assessments from the fund should be deleted, and that any reform to the liability scheme must maintain adequate funding for natural resource restoration. In addition, the statute of limitations should be amended to last three years after the completion of a damage assessment. We also urge you to clarify language regarding issues such as damages due to threatened releases and collection of damages for interim losses of resources. Further, we believe the provision requiring selection of the most cost-effective and cost-reasonable remedy, as defined in H.R. 2500, may preclude the selection of the most appropriate remedy for achieving restoration.

Voluntary Cleanups. It is important to the states that parties that have completed site remediation activities in accordance with state brownfields laws receive a release of federal

liability. The language in the voluntary cleanup title needs to be flexible enough to accommodate different state brownfield or voluntary cleanup laws. The states see no need for the Environmental Protection Agency to be allowed to review and approve the contents of state brownfields laws, and we urge that provisions allowing such review be removed from the bill.

Federal Facilities. We maintain our support for treating federal facilities the same as other CERCLA sites and ask that you modify the bill to allow the application of state law at federal sites. The Governors do support provisions in the Federal Facilities title to facilitate the leasing or transference of portions of sites.

State Role. NGA has been a leader in the push for state delegation or authorization at NPL sites, and appreciates the steps you have taken in H.R. 2500 toward delegation. However, we would like to see an authorization option added to the bill, to allow states to manage site cleanup with minimum federal intervention and to allow states to implement their own remedy selection processes. This would allow states to operate one program and would aid in the development of the strong state programs that will be essential as the Superfund program is eventually phased out in the future.

Mandates. Finally, the Governors are opposed to the creation of mandates that present additional federal requirements for the states. We urge that you keep this in mind during the legislative process.

We appreciate your leadership and hard work on this important program and look forward to working with you in developing a final proposal that can enjoy bipartisan support.

Sincerely,

Governor Fife Symington
Chair, Committee on Natural Resources

Governor B. Benjamin Nelson
Vice Chair, Committee on Natural Resources

NATIONAL GOVERNORS' ASSOCIATION

Tommy G. Thompson
Governor of Wisconsin
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Hall of the States
444 North Capitol Street
Washington, D.C. 20001-1512
Telephone (202) 624-5300

November 16, 1995

The Honorable John D. Dingell
House Commerce Committee
United States House of Representatives
Washington, D.C. 20515

Dear Congressman Dingell:

The National Governors' Association (NGA) is pleased to have reviewed the Superfund reform bill, H.R. 2500. Before full committee markup begins on H.R. 2500, the Governors would like to express support for many aspects of Congressman Michael Oxley's proposal, and we applaud the efforts that have been taken to make the Superfund program more effective and reasonable. We would also like to recommend a number of changes to strengthen the proposal.

State Standards. The Governors oppose the preemption of state applicable standards at National Priorities List (NPL) sites, and we urge you to delete this provision from your proposal. Even though state applicable standards related to water and air emissions may be applied at some sites, the Governors feel that the provision does not go far enough. State standards are applied for specific media and for addressing site-specific conditions in an effort to adequately protect human health and the environment based on local circumstances. In particular, we want to ensure that state standards protecting groundwater are respected in Superfund cleanups.

- Congress should create incentives for responsible parties to engage in voluntary cleanup efforts.
- The uncertainty surrounding the scope of the secured creditor exemption provided by the existing statute must be addressed. Congress must resolve the issue of "lender liability" in order to promote the development of formerly used industrial and commercial properties (i.e. "Brownfields"). Serious consideration should be given to codifying in statute the U.S. EPA regulations that were struck down in Kelly v. EPA, 15 F.3d 1100 (D.C. Cir. 1994).
- Congress should create an incentive program to foster the re-use of formerly used industrial and commercial properties (i.e. Brownfields).
- Congress should take the Superfund Trust Fund "off-budget" and provide that all monies collected pursuant to CERCLA's revenue raising mechanisms are used only to fund program activities and site cleanups. Furthermore, Congress should fully appropriate monies in the Superfund Trust Fund for the purposes stated and set out in CERCLA.
- States should be allowed to use Superfund Trust monies to assess natural resource damages to address discharges and releases pursuant to CERCLA and to remedy such damages. Congress should remain mindful of the fact that states have fiduciary obligations as the trustees for their natural resources.
- Federal natural resource damage provisions are necessary to ensure uniform, minimum standards to protect the public health and environment. However, the various federal statutes that contain such provisions must be flexible in order to allow states to best respond to local needs. Specifically, states should be authorized to apply state natural resource damage provisions that are stricter than their federal counterparts.
- Congress should not federally mandate a statute of limitation period for natural resource damages. Questions concerning the timeliness of legal actions should be a matter of individual state determination pursuant to state law.
- States should be given the opportunity to assume primary management and enforcement responsibility for natural resource damage programs. Their familiarity with local situations allows them to develop programs that are the

Liability Reform. We realize that the issue of liability has been a contentious area in the Superfund reform proceedings, but we want you to know that the Governors would support a repeal of retroactive liability at municipal landfills. The Governors support addressing the liability of municipalities, *de minimis* and *de micromis* parties, lenders, and prospective purchasers as a positive step that will reduce transaction costs and extensive litigation. In considering any broader liability reform, however, we urge you to consider the significant effects such reform will have on state cleanup programs as well as on the size of the cost share required of states for federally-funded cleanups at NPL sites. Additionally, it is important to note that the current federal liability provisions have produced a significant responsible party cleanup effort.

We also ask that you ensure that states are not the victims of cost shifts due to reforms in Superfund liability. The states do not believe the proposal to allow states to petition the Office of Management and Budget for reduction in cost share is an adequate solution to this problem. This process is not realistic and would probably not be effective.

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Federal Facilities. We maintain our support for treating federal facilities the same as other CERCLA sites and ask that you modify the bill to allow the application of state law at federal sites. The Governors do support provisions in the Federal Facilities title to facilitate the leasing or transference of portions of sites.

State Role. NGA has been a leader in the push for state delegation or authorization at NPL sites, and appreciates the steps you have taken in H.R. 2500 toward delegation. However, we would like to see an authorization option added to the bill, to allow states to manage site cleanup with minimum federal intervention and to allow states to implement their own remedy selection processes. This would allow states to operate one program and would aid in the development of the strong state programs that will be essential as the Superfund program is eventually phased out in the future.

Mandates. Finally, the Governors are opposed to the creation of mandates that present additional federal requirements for the states. We urge that you keep this in mind during the legislative process.

We appreciate your leadership and hard work on this important program and look forward to working with you in developing a final proposal that can enjoy bipartisan support.

Sincerely,

Governor [illegible] Symington
[illegible] on Natural Resources

Governor E. Benjamin Nelson
Vice Chair, Committee on Natural Resources

Oregon

DEPARTMENT OF
ENVIRONMENTAL
QUALITY

October 23, 1995

Honorable Michael G. Oxley
Chairman
Subcommittee on Commerce, Trade,
and Hazardous Materials
Room 2125, Rayburn House Office
Washington, DC 20515-6115

Re: Testimony on H.R. 2500

Dear Representative Oxley:

Attached is my testimony on H.R. 2500.

Below are the critical points of the testimony:

- Need to identify and treat "hot spots";
- Need to have single cleanup standard;
- Need to retain liability structure but add allocation method;
- Need to delegate to states with adequate funding;
- Need for uniform application of state standards;
- Need to recover natural resources damages; and
- Need to have both federal Superfund and state cleanup programs.

I believe that Oregon is well on its way to balancing protection with reasonable cost. I look forward to sharing more on these items when I testify on October 26, 1995.

Thank you.

Sincerely,

Langdon Marsh
Director

Good morning. I am Langdon Marsh, and I am the Director of the Oregon Department of Environmental Quality. I am speaking today in support of Superfund reform and elements of H.R. 2500, and I want to provide you with one state's perspective on a few critical issues.

Introduction

While Oregon may be unique in the particulars of its state superfund, I believe there are many interests that are shared: our primary shared interest is to have both federal and state superfund programs that protect our citizens and our environment.

Oregon recently reformed its state superfund law. On July 18, 1995 Gov. Kitzhaber signed into law a reform measure that was sponsored by industry and was a collaborative effort among my agency, environmental groups, and the citizens of Oregon. Elements of the law are subject to additional rulemaking, but I believe that Oregon has a framework where we will get cleanup done at a lower cost while we protect our citizens and our natural resources.

Our legislature was quite receptive to superfund reform, but they were adamant that our natural resources would not be impaired. First and foremost was the protection of our citizens, but protection of groundwater was also imperative. Like most Western states, Oregonians rely heavily on groundwater: over 75% of Oregonians rely on groundwater as at least a backup water supply and almost 50% rely on groundwater exclusively. Our most sensitive aquifers are in our valleys, and these aquifers are most heavily used by our population and most subject to contamination. As Oregon grows and as new industries locate here, our reliance on clean groundwater is steadily increasing. While we are fortunate that the vast majority of our groundwater is not contaminated, we unacceptable risk. Even though treatment is preferred at "hot spots," the remedy selection is still subject to balancing factors.

These factors are: (1) effectiveness of the remedy; (2) technical and practical implementability; (3) long-term reliability; (4) short-term risk from implementation; and (5) reasonableness of cost. So, while treatment is preferred for "hot spots," any remedy must be cost reasonable.

Title I – Remedy Selection

We believe that H.R. 2500's "lowest cost" remedy selection language goes too far in that there are virtually no checks to ensure that treatment is considered as a cleanup option. Oregon believes the "hot spot" approach is a tool to ensure that excessive contamination is not left in place, while still putting appropriate bounds on the cost of remediation.

Oregon elected to move to a single risk level rather than retaining its site-by-site standard ("lowest feasible") or adopting the Superfund cleanup range (for simplicity, the cancer risk range of 1×10^{-6} to 1×10^{-4}). Oregon does not require treatment to the 10^{-6} level, but it does require protection to that level -- the protection may include institutional or engineering controls that limit exposure. My concern with retaining the risk range while changing the whole of the risk calculus is that we will simply be juggling numbers and not protecting our citizens or our environment. If we change the risk protocol (how risk is calculated) and require the lowest cost remediation, we may be changing *cleanup* programs to *containment* programs that pose future and unacceptable risks to our citizens.

Title II – Liability

While Portland has a good current water supply in our Bull Run reservoir, Portland and the rest of the state rely on uncontaminated groundwater. Portland's main backup well supply in East Multnomah County (EMC) is currently threatened by a TCE release from two sites. We must protect this resource to accommodate future industrial and population growth. When we redevelop brownfields, we want to make sure that both the land and the water are put back into productive use, where that's practicable.

Title VI – Federal Facilities

Oregon shares H.R. 2500's goals of cleaning up and putting federal facilities back into productive use as well. As stated before, we believe all RPs, including federal facilities, should be held to the same standards. State standards should prevail at these sites and the states should not be penalized for holding federal facilities to the same standards as other RPs. We support the provisions that provide a meaningful role in remedy selection to states that adjoin nuclear defense facilities. Likewise we support the

waiver of sovereign immunity and requirement to follow state standards as well as the provision making compliance agreements enforceable by the states.

Title IV – Natural Resources Damages

Oregon believes that the reform bill must continue to allow restoration costs for natural resources damages. We cannot support a monetary cap that would not allow full recovery, but we realize that the prospect of unlimited liability needs some bounds. We believe that limiting the time in which a claim can be filed by a trustee and requiring more thorough assessments are reasonable steps, but limiting recovery to "committed uses" may be too narrow. Under Oregon's environmental cleanup law, we anticipate that weakening the level of protection for our citizens and environment. I urge you to look carefully at many of the reforms and weigh how these changes will affect the environment by weakening state programs. I ask that you recognize the continued need for Superfund and that you reform the law in ways that make it less onerous without removing the power to protect groundwater and other resources. We hope to continue to work with you to achieve the shared goals of the states and federal government, while environmental protection and economic development work hand-in-hand.

Thank you for the opportunity to testify today. I would be more than willing to answer any questions you may have.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C 20460

OFFICE OF
SOLID WASTE AND EMERGENCY
RESPONSE

The Honorable Michael G Oxley
Chairman, Subcommittee on Commerce,
Trade, and Hazardous Materials
U S House of Representatives
Washington, D C 20515

Dear Mr Chairman

Thank you for your letter dated October 25, 1995, to Administrator Carol Browner requesting information on the Environmental Protection Agency's (EPA) soil lead policy

Enclosed is information responsive to your request number 3 that are being provided by the Office of Solid Waste and Emergency Response These materials focus on the Superfund program national lead policy and lead model development. It is my understanding that EPA's Office of Prevention, Pesticides, and Toxic Substances is supplying you under separate cover with additional documents responsive to your request numbers 1 and 2.

With regard to your request number 4, EPA plans to complete the Urban Soil Lead Abatement Demonstration Project Integrated Report, associated data, and other pertinent documentation by the end of January 1996. At that time, the final Intergrated Report on the project, more generally known as the "Three-Cities Soil Lead Study", will also be made publicly available. Advance copies of these materials will be provided to your Committee as soon as they are available. It is my understanding that this schedule is agreeable to the Committee based upon discussions my office has had with your staff. The final report will address additional substantive scientific comments on the analyses that were conducted and the analytical results that were incorporated into the draft Intergrated Report. These additonal comments were received at an external peer review workshop held by EPA in September 1995 and during the public comment period that ended October 16, 1995.

A list of responsive materials that have been deemed by the Agency as deliberative are identified in Enclosure 1 Since these materials are predecisional in nature and protected under the Freedom of Information Act by the deliberative process privilege, I would request that they not be publicly disseminated. Enclosure 2 is a list of materials that are not deliberative As requested, we are providing copies of the actual documents that are listed in enclosures 1 and 2 to Chairman Bliley Finally, enclosure 3 is a list of documents that were delivered to Committee staff on Friday, November 17th.

I apologize that the recent shutdown of the Federal government has caused some delay in responding to questions raised in your letter. Thus, while I am now providing the Committee with these documents, I will send you a follow-up letter by December 15, 1995, that responds to the specific questions you raised in your letter

Please call me or Steve Luftig, Director of the Office of Emergency and Remedial Response, if you have any questions regarding the Agency's Superfund soil lead activities. Mr. Luftig can be reached at (703) 603-8960

Sincerely,

Elliott P. Laws
Assistant Administrator

Deliberative Materials (Enclosure 1)

The Documents identified below are predecisional, draft documents, or comments on such documents, and are thus protected under the Freedom of Information Act by the deliberative process privilege. As you know, the expectation that such documents will not generally be widely disseminated contributes to the frank exchange of views within the Agency. Accordingly, we request that the enclosed documents not be publicly disseminated.

1 Guidance Manual Materials

External peer review comments; letter to peer reviewers from Susan Griffin, Dec. 13, 1991 from review of 0.5 Users Guide, 1st draft, 1/91 (every other page).

Haness, S. 1992 (December 21). Note to Allan Susten, ATSDR on the IEUBK.

Haness, S.J. 1993 (September 28). Note to Alan Susten (ATSDR) on EPA's IEUBK Model Guidance Manual.

Matte, T. 1993 (September 28). Comments on IEUBK Guidance Manual. Letter to Larry Zaragoza, USEPA.

Zaragoza, L.J. 1993 (September 7). Memorandum inviting comment on the draft Guidance Manual for the IEUBK to reviewers.

Mushak, P. 1992 (February 11). Letter to Tom Matte, CDC.

Binder, S. 1992 (January 30). Letter to Susan Griffin EPA with comments on the draft Guidance Manual.

Hogan, K. 1992 (February 12). Memorandum to Susan Griffin with Comment on the draft Guidance Manual.

Porter, J.W. 1989 (February 8) Need for Toxicological Values for Lead. Memo to Eric Bretthauer, ORD on need for toxicological values for lead.

2. Data Dictionary

Davis, B. 1994 (September 14). Compilation of Peer Review comments on draft parameters and equations dictionary. U.S. EPA/OSWER/OERR.

McClure, P. and G. Diamond. 1995 (February 13). Parameters and Equations Dictionary: DRAFT Response to Peer Reviewers' analysis conducted by Syracuse Research Corporation.

3. Validation

Science Applications International Corporation. 1995. Draft Phase 1 Report for the Independent Verification and Validation (IV&V) of the Integrated Exposure Uptake Biokinetic (IEUBK) Model for Lead in Children. Volumes I and II.

4. SAB reviews and correspondence

Canter, D. 1992 (January 31). Comment on Draft SAB Report on Review of Uptake Biokinetic Model for Lead.

5. OSWER Lead Policy Directive Materials

Adams, W. 1992 (June 17). Letter to Larry Reed, EPA on the draft OSWER lead directive.

Akin, E.W., 1992 (October 9). Region 4 comments on Draft OSWER Directive. Memo to Barbara Davis, EPA.

Cantor, D., and M. Shapiro. 1992 (July 9). Comment on the draft OSWER Lead Directive. Memo to Barbara Davis, EPA.

Ells, S. 1992 (March 12). Comments on Draft Directive to David Bennett.

Falk, H. 1992 (June 17). Letter to Barbara Davis, EPA on the draft OSWER Directive.

Froehlich, M. 1992 (July 28). Comment on the draft OSWER Lead Directive. Memo to Henry Longest, OERR and Joe Carra, OPPT.

Haines, J.H. 1992 (June 15). Comment on Draft OSWER Lead.

Matte, T.D. 1993 (April 13). Letter to David Bennett, EPA.

Matte, T.D. and L. Rosenblum. 1993 (August 25). Letter to Melissa Shapiro on the Draft OSWER lead directive.

_____. 1992 (August 7). Comments on Draft directive. Note to Authur Weissman/Steve Ells.

Lew, R. 1992 (August 13). Comments on Draft OSWER Lead Directive.

Muno, W.E. (1992). Comments to Barbara Davis, OERR on Draft OSWER Lead directive.

Santarella, Joseph M., Jr. Undated. Comments on the draft OSWER lead directive to Bruce Means, EPA.

Susten, A. 1993 (August 26). Letter to Melissa Shapiro with comments on the draft OSWER directive.

Van Leeuwen, P. 1992). Summary of Telephone message author of message not identified.

Voltagio, T.C. 1992 (October 20). Comments on Draft OSWER Lead Directive.

6. Peer Review of Section 403 Cost/Beneftis Analysis

Melone, J. and L. Reed. 1995. Note to Joe Carra on the Peer Review of Section 403 Cost/Benefits Analysis. (Attachment is the Note from Larry Reed to Lynn Moos of July 26, 1995.

Additional Materials (Enclosure 2)

1. Guidance Manual

Grant, L.D. 1994 (February 10). Memorandum to Larry Reed transmitting the Guidance Manual for the IEUBK.

Bergstrom, P.D. 1992 (March 13). Letter to Susan Griffin and Allan Marcus with ARCO comment on the draft guidance manual.

Bornschein, R.L. 1992 (February, 17). Letter to Susan Griffin with comments on the draft Guidance Manual.

Roth, R. 1992 (September 21). Comments of ARCO on the draft guidance manual.

2. Data Dictionary

O'Flaherty, E. 1994 (September 1). Review comments on draft Technical Support Document.

Enclosures Previously Delivered (Enclosure 3)

1. Guidance Manual Materials

Longest, H.L., II and M.H. Shapiro. 1994 (March 23). Transmittal of Guidance Manual for the Integrated Exposure Uptake Biokinetic Model for Lead in Children and IEUBK Model, Version 0.99d. Memorandum to EPA Regional Managers.

US. Environmental Protection Agency 1991 (December). Draft Guidance Manual for Site Specific use of the U.S. Environmental Protection Agency Lead Model.

Triangle Associates, Inc. 1992 (September 21). Proceedings Meeting to Discuss Draft Soil Lead Cleanup Directive. Prepared for the Office of Emergency and Remedial Response, EPA [This meeting is also known as the stakeholders' meeting.]

EPA. 1994. Guidance Manual for the Integrated Exposure Uptake Biokinetic Model for Lead in Children. Office of Solid Waste and Emergency Reponse. NTIS number 93-963510 (guidance and computer diskette for IEUBK)

Battelle Laboratories. 1993. Backward Euler Solution Algorithm.
[Other draft chapters were delivered along with this algorithm. However, these chapters are being replaced by subsequent analyses. These draft materials will be provided upon request.]

2. Model Technical Support and Validation

Luftig, S.D., and M. H. Shapiro. 1995. "Transmittal of Two Technical Documents on the Integrated Exposure Uptake Biokinetic (IEUBK) Model for Lead in Children. Memorandum dated February 4, 1995.

Environmental Protection Agency (EPA). 1995. Technical Support Document: Parameters and Equations Used in the Integrated Exposure Uptake Biokinetic Model for Lead in Children. U.S. Environmental Protection Agency. NTIS number PB94-963504.

Environmental Protection Agency (EPA). 1995. Validation Strategy for the Integrated Exposure Uptake Biokinetic Model for Lead in Children. U.S. Environmental Protection Agency. NTIS number PB94-963505.

Griffin, S. 1994 (July 22). Letter to invite comment on the draft technical support document and parameters and equations for the IEUBK.

Hogan, K. 1994 (July 22). Invitation for comment on the draft Validation Strategy for the IEUBK.

Validation Results

Hogan, K.A., RW. Elias, A.H. Marcus, and P.D. White. 1995. Comparison of predicted and observed blood leads from EPA/ATSDR field data. Presentation materials from the Society of Toxicology Annual Meeting in Baltimore, Md.

Marcus, A. And R.E. Elias. 1995. Characterizing Sources of Variability in the U.S. EPA IEUBK Lead Model by Monte Carol Simulation.

Review Articles

Renner, R. 1995. When is Lead Health a Risk? *Environmental Science and Technology 29(6):256-261.*

_____ 1995 (May 3). Silbergeld Compares Toxicology v. Epidemiology for Risk Assessments. Pesticide & Toxic Chemical News (202-544-1980).

3. SAB reviews and correspondence

Science Advisory Board Report. 1992. An SAB Report: Review of the Uptake Biokinetic (UBK) Model for Lead. Review, by the Indoor Air Quality and Total Human Exposure Committee, of the OSWER Model to Assess Total Lead Exposure and to Air in Developing Soil Lead Cleanup Levels at Residential CERCLA/RCRA Sites. EPA-SAB-IAQC-92-016

Science Advisory Board Report. 1990. Review of the OAQPS Lead Staff Paper and the ECAO Air Quality Criteria Document Supplement. Report of the Clean Air Scientific Advisory Committee (CASAC). A Science Advisory Board Report. U.S. Environmental Protection Agency. EPA-SAB-CASAC-90-002.

Larson, T. And R.O. McClellan. 1989. Letter report of the Clean Air Scientific Advisory Committee (CASAC) to EPA Administrator William Reilly on "Review of the National Ambient Air Quality Standards for Lead: Exposure Analysis Methodology and Validation."

4 OSWER Lead Policy Directives

Laws, E. 1994. The Revised Interim Soil Lead Guidance for CERCLA Sites and RCRA Corrective Action Facilities, OSWER Directive # 9355.4-12. NTIS # PB94-9632282 Office of Solid Waste and Emergency Response, EPA.

Clay, D.R. 1991 (August 29). Update on OSWER Soil Lead Cleanup Guidance. Memorandum to EPA Regional Managers.

Longest, H.L. and B. Diamond. 1990 (January 26). Supplement to Interim Guidance on Establishing Soil Lead Cleanup Levels at Superfund Sites. Memorandum to EPA Regional Managers. OSWER Directive #9355.4-02A. Office of Solid Waste and Emergency Response, EPA.

Longest, H.L. and B. Diamond. 1989 (September 7). Interim Guidance on Establishing Soil Lead Cleanup Levels at Superfund Sites. Memorandum to EPA Regional Managers. OSWER Directive #9355.4-02. Office of Solid Waste and Emergency Response, EPA.

EPA. 1994. Information fact sheet for internal EPA use "Revised Interim Soil Lead Guidance for CERCLA Sites and RCRA Corrective Action Facilities."

Draft Directive: Clay, D. 1992 (June 4). Draft Revised Guidance on establishing Soil Lead Cleanup Levels at CERCLA Sites and RCRA Facilities.

5. OPPTS Lead Directive

Goldman, L.R., M.D. 1994 (July 14). Guidance on Residential Lead-Based Paint, Lead-Contaminated Dust, and Lead-Contaminated Soil. Memorandum to EPA Regional managers. Office of Prevention, Pesticides and Toxic Substances. EPA

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

Office of Congressional and
Legislative Affairs

February 12, 1996

Honorable Michael Oxley
Chairman Subcommittee
on Commerce Trade and Hazardous Materials
Committee on Commerce
U S House of Representatives
Rayburn House Office Building ROOM 2125
Washington D C 20515-6115

Dear Mr Chairman

This is in response to the questions posed by the Subcommitttee to Administrator Browner following the October 26, 1995 hearing on H R 2500

Enclosed is the response to question 7 This response was prepared by the EPA Office of Solid Waste and Emergency Response The responses to questions 1-6 were transmitted under separate cover last week

If there is any further information the Agency can provide to assist the Subcommittee, please contact Barbara Bassuener of my staff (Telephone 260-5435)

Sincerely,

Robert W Hickmott
Associate Administrator

Enclosure

Responses to Questions following October 26, 1995, hearing
Subcommittee on Commerce, Trade and Hazardous Materials
U S House of Representatives Committee on Commerce

Question 7 In your testimony, and again in response to a question to Mr. Wyden, you indicated that EPA estimated the costs of H.R. 2500 to be in excess of $2 billion annually. You also showed a chart which indicated an estimated total annual cost of the Superfund program to be in excess of $2 6 billion annually. However, other estimates received by the Committee regarding the cost of the Superfund program under H.R. 2500 have been much lower. Please provide a detailed explanation of how you and your staff arrived at this figure and provide for the record all documents and other material relating to the methodology and assumptions used in *this analysis.*

Description of EPA Graph Used in October 26, 1995 Hearing
before the House Commerce Committee

At a hearing of the House Commerce Committee on October 26, 1995, EPA presented preliminary estimates for the cost of the major components of H.R. 2500 as well as stand-alone estimates of individual liability provisions of the Bill. The estimates were based on the Bill as introduced and do not take into consideration any subsequent amendments made in subcommittee. Stand alone estimates considered the cost if only that particular liability provision were implemented. The specific estimates presented included:

- The cost of H.R.2500,
- The stand-alone cost of the Retroactive Liability Discount (RLD),
- The stand-alone cost of the municipal landfill carve-out [1],
- The cost of shifting ongoing operations and maintenance (O&M) from States (at Fund-lead sites) and PRPs at municipal landfill sites to EPA,
- The stand-alone cost of the liability exemptions for de minimis generators and transporters, and
- The stand-alone cost of the liability exemption for generators of materials for recycling.

This section describes the derivation of the costs of those initial cost estimates of H.R 2500 and modifies EPA's estimate of the cost of the municipal co-disposal landfill exemption The estimates presented in October and any revisions outlined below do not take into consideration remedy selection savings, the effect on Federal facilities, or the implementation costs of numerous provisions of the Bill such as reopening RODs and administering the RLD. The analysis presented assumed that cleanups would proceed through the remedial pipeline at their current pace and cost. In fact, EPA believes that the ROD-reopener provisions and the ability to challenge any EPA-selected remedy will slow the pace of cleanup substantially. In addition, substantial additional costs would be incurred to stop work while reconsidering, re-designing, and implementing any new remedies.

In estimating these costs, EPA calculated changes in EPA's $1.431 billion baseline FY 1995 Superfund budget that would result from shifting of enforcement lead (i.e. PRP) sites, in whole or in part, from PRPs to the Fund. In calculating the Retroactive Liability Discount, EPA assumed that PRPs continue to conduct approximately 75% of the Superfund cleanup work (this varies by category of work, i.e. Removal, RI/FS, RD, or RA) and do so 20% more efficiently than EPA. Based on a $642 million EPA direct cleanup budget, EPA estimated that PRPs conduct $1.5 billion annually in direct cleanup.

Derivation of Stand Alone "Retroactive Liability Discount"

The RLD would require EPA to reimburse PRPs for 50% of their response costs incurred after October 18, 1995, which are attributable to waste disposed of prior to 1987. EPA estimates that 95% of all waste disposal at NPL sites occurred prior to 1987 Below is the calculation estimating the cost to the Fund to implement the Retroactive Liability Discount as a stand-alone provision at all PRP-lead sites.

$1.5 billion annual PRP cleanup spending
x 95% Pre-1987 waste disposal
x 50% Retroactive Liability Discount
= $712 million annual stand-alone "RLD"

Derivation of Co-Disposal Landfill Carve-out Costs

At the October hearing, EPA estimated that the cost of the co-disposal landfill liability exemption was approximately $517 million annually. This estimate inadvertently included a portion of the cost attributable to EPA's share of O&M at new Fund Lead sites which would not be affected by the landfill exemption.

[1] The municipal landfill carve-out estimates are based on exempting 250 co-disposal landfill sites (196 enforcement lead) identified in EPA's RELAI database.

Outlined below is EPA's calculation of the incremental cost of the landfill exemption on each phase of the remedial pipeline. These estimates represent the extramural response costs of the exemption and preliminary estimates for the incremental administration and support resources needed to support the additional Fund-lead work associated with the landfill exemption In developing this estimate, EPA identified 196 enforcement-lead landfill sites which would be subject to the exemption. This represents 22% of the 867 enforcement-lead sites in the current NPL. Cleanups shifted from PRPs to the Fund were assumed to become 20% more costly In summary, the estimated annual cost of the landfill exemption at full implementation is $394 million

RI/FS ($26 million PRP RI/FS spending)
x (22% landfill sites)
x (100% Federal share)
$5.7 million /(80% PRP efficiency) = $7.2 million

RD ($86 million PRP RD spending)
x (22% landfill sites)
x (100% Federal share)
$18 9 million /(80% PRP efficiency) = $23.6 million

RA ($850 million PRP RA spending)
x (22% landfill sites)
x (90% Federal share)
$168 3 million /(80% PRP efficiency) = $210.4 million

O&M ($458 PRP O&M spending)
x (22% landfill sites)
x (90% Federal share)
$ 85 million /(80% PRP efficiency) = $113.4 million

Total additional cleanup:	$355 M
Additional response support:	$ 25 M
Additional administrative support:	$ 14 M
Total carve-out cost:	$394 M

Cost of Ongoing O&M Under New Liability and State Cost Share Rules

H.R. 2500 proposes to increase EPA's share of O&M from 0% to 90% for all Fund-lead O&M projects This would increase the Federal share at the existing Fund-lead O&M projects in the pipeline. It would also require EPA to pay 90% of O&M at the 22% of enforcement- lead O&M projects shifted to the Fund as the result of the co-disposal landfill exemption. The estimates presented for the cost of the various liability exemptions include the cost off applying the new cost share rules to new O&M projects. However, the carve-out estimates do not include the costs to EPA of assuming 90% of the O&M costs for existing Fund-lead O&M projects and existing PRP lead O&M projects which would be exempted under H.R. 2500. Finally, EPA would also be required to reimburse PRPs the "Retroactive Liability Discount" (RLD) for existing O&M projects at PRP-lead sites not otherwise exempted under H.R.2500. These costs are not included in EPA's estimate of the annual cost of the RLD.

EPA estimates that the Fund liability for ongoing State-lead O&M (90% Federal Share), PRP-lead O&M at co-disposal landfill sites (90% Federal Share), and the RLD at all other ongoing PRP-lead O&M (47% Federal Share) is approximately $2.7 billion. When annualized over the remaining O&M years at those projects (number of projects x number of O&M years remaining = 12,200 total O&M years), the annual Fund liability to pay for ongoing O&M or the associated RLD will be approximately $220 million. This estimate is not included in the $2.6 billion annual estimate for the cost of H.R. 2500

Derivation of Stand Alone Scrap Metal Recycler Generator/Transporter Exemption

EPA estimates that there are approximately 25 enforcement-lead recycling sites on the NPL which would be subject to the recycler provisions of H R.2500 This represents 2.8% of the 867 enforcement-lead sites on the NPL The percent of liability per site associated with the generators/transporters was assumed to be 50%. To exempt 50% of the liability at 2.8% of the PRP-lead sites is equivalent to exempting 1.4% of all PRP-lead sites Thus, the Fund would bear 100% of the costs at 1 4% of sites for the RI/FS and RD phases and 90% of the costs associated with the RA and O& M due to the revised cost share rules. It was also assumed that EPA would conduct these cleanups 20% more expensively than PRPs The resulting EPA estimate of approximately $21 million annually reflects only the increased cleanup costs of the proposed exemption and does not include any additional administrative cost or savings associated with that provision

Derivation of Stand Alone De Minimis Generator Exemption

EPA estimates that there are 220 sites on the NPL with de minimus parties. Based on analysis of detailed volumetric data at nearly 40 sites, parties who contributed 1% of waste to the site comprise approximately 17% of the waste at these sites Assuming the percent of liability per site associated with the generators and transporters is 50%, this equates to 19 sites (220 sites x 17% waste x 50% liability share = 19 sites) Thus, the proposal would essentially exempt 2% of 867 enforcement-lead sites When applied to the $1 5 billion in estimated annual PRP cleanup spending, this results in an estimate of approximately $30 million annually This represents only the increased cleanup costs and does not include any additional administrative costs or savings associated with that provision

Components of $2.6 Annual Billion Estimate for H.R.2500 used in Hearing Testimony

In preparing the estimate of total cost, EPA compared actual lists of sites to ensure that any given site was only counted once in any given category Thus, there is no duplicate counting of any sites which fell into more than one exempted categories. If sites fell into both the municipal landfill category and the de minimis or recycler categories, they were included under the municipal landfill exemption Once PRP spending by all exempted sites/parties were excluded from PRP spending estimates, the RLD was calculated. This prevented any duplicate counting between the exemptions and the RLD

- Baseline FY95 EPA Superfund budget	$1 431 billion
- Response costs associated with all liability exemptions (including co-disposal, recycler, and de minimis exemptions)	$0 391 billion
- Cost of Retroactive Liability Discount (after liability exemptions are taken into consideration)	$0.548 billion
- Cost of new State cost share rules @ Fund-Lead sites	$0 172 billion
- Costs to implement allocation provisions	$0 067 billion
- Enforcement transaction cost savings associated with exempted parties/sites	($0 035 billion)
- Additional administrative and response support costs associated with new Fund-lead cleanups	$0.062 billion
Total.	$2.636 billion

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